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84-1593

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

BRUNSWICK CORPORATION,

Petitioner,

vs.

RIEGEL TEXTILE CORPORATION,

Respondent.

APPENDIX TO PETITION FOR CERTIORARI

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STATUTES INVOLVED

Selected portions of the Antitrust Laws

(15 U.S.C. § 1 et seq.)

§ 1. Trusts, etc., in restraint of trade illegal; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. . . .

§ 2. Monopolizing trade a felony; penalty

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, ...

§ 15. Suits by persons injured; amount of recovery; . . .

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

§ 15b. Limitation of actions

Any action to enforce any cause of action under sections 15, 15a, or 15c of this title shall be forever barred unless commenced within four years after the cause of action accrues.

§ 18. Acquisition by one corporation of stock of another

No person engaged in commerce or in any activity affecting commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another person engaged also in commerce or in

any activity affecting commerce, where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly. . . .

Selected Portions of the Patent Act (35 U.S.C. § 1, et seq.)

§ 122. Confidential status of applications

Applications for patents shall be kept in confidence by the Patent and Trademark Office and no information concerning the same given without authority of the applicant or owner unless necessary to carry out the provisions of any Act of Congress or in such special circumstances as may be determined by the Commissioner.

§ 135. Interferences

(a) Whenever an application is made for a patent which, in the opinion of the Commissioner, would interfere with any pending application, or with any unexpired patent, he shall give notice thereof to the applicants, or applicant and patentee, as the case may be. The question of priority of invention shall be determined by a board of patent interferences (consisting of three examiners of interferences) whose decision, if adverse to the claim of an applicant, shall constitute the final refusal by the Patent and Trademark Office of the claims involved, and the Commissioner may issue a patent to the applicant who is adjudged the prior inventor. A final judgment adverse to a patentee from which no appeal or other review has been or can be taken or had shall constitute cancellation of the claims involved from the patent, and notice thereof shall be endorsed on copies of the patent thereafter distributed by the Patent and Trademark Office. . . .

§ 141. Appeal to Court of Appeals for the Federal Circuit

An applicant dissatisfied with the decisions of the Board of Appeals may appeal to the United States Court of Appeals for the Federal Circuit, thereby waiving his right

to proceed under section 145 of this title. A party to an interference dissatisfied with the decision of the board of patent interferences on the question of priority may appeal to the United States Court of Appeals for the Federal Circuit, but such appeal shall be dismissed if any adverse party to such interference, within twenty days after the appellant has filed notice of appeal according to section 142 of this title, files notice with the Commissioner that he elects to have all further proceedings conducted as provided in section 146 of this title. Thereupon the appellant shall have thirty days thereafter within which to file a civil action under section 146, in default of which the decision appealed from shall govern the further proceedings in the case.

§ 146. Civil action in case of interference

Any party to an interference dissatisfied with the decision of the board of patent interferences on the question of priority, may have remedy by civil action, if commenced within such time after such decision, not less than sixty days, as the Commissioner appoints or as provided in section 141 of this title, unless he has appealed to the United States Court of Appeals for the Federal Circuit, and such appeal is pending or has been decided. In such suits the record in the Patent and Trademark Office shall be admitted on motion of either party upon the terms and conditions as to costs, expenses, and the further cross-examination of the witnesses as the court imposes, without prejudice to the right of the parties to take further testimony. The testimony and exhibits of the record in the Patent and Trademark Office when admitted shall have the same effect as if originally taken and produced in the suit. . . .

In the

United States Court of Appeals

For the Seventh Circuit

No. 84-1334

BRUNSWICK CORPORATION, a Delaware corporation,
Plaintiff-Appellant,

v.

RIEGEL TEXTILE CORPORATION, a Delaware corporation,
Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division
No. 82 C 4374—Marvin E. Aspen, *Judge.*

ARGUED SEPTEMBER 19, 1984
—DECIDED DECEMBER 19, 1984

Before WOOD and POSNER, *Circuit Judges,* and CAMPBELL, *Senior District Judge.**

POSNER, *Circuit Judge.* Brunswick Corporation appeals from the dismissal, on the pleadings, of its antitrust suit against Riegel Textile Corporation. 578 F. Supp. 893 (N.D. Ill. 1983). The appeal requires us to consider aspects of the relationship between patent and antitrust law.

The complaint alleges that in 1967 Brunswick invented a new process for making "antistatic yarn," which is used to make garments worn in hospital operating rooms and other areas where there are volatile gases that could be ignited by static electricity. Brunswick, which is not itself a textile manufacturer, disclosed its invention to

* Hon. William J. Campbell of the Northern District of Illinois, sitting by designation.

Riegel, which is. Riegel promised to keep the invention secret. In April 1970 Brunswick applied for a patent on the new process and in August Riegel did likewise—in breach of its agreement with Brunswick. (Riegel denies that this was a breach, but as Brunswick has been given no chance to substantiate the allegations of its complaint we must treat them as true for purposes of this appeal.) Without considering Brunswick's application the Patent Office issued a patent to Riegel in 1972. The Patent Office discovered the Brunswick application in 1973, and in 1975 instituted a patent-interference proceeding to determine priority of invention between Riegel and Brunswick. See 35 U.S.C. § 135; 1 Rosenberg, Patent Law Fundamentals § 10.02 (2d ed. 1984). That proceeding was still pending before the Patent Office when Brunswick brought this lawsuit in 1982, but since then the Patent Office has held that although Brunswick indeed invented the process first, its patent application was invalid. Brunswick has challenged this ruling in another lawsuit in the Northern District of Illinois, and it has also sued Riegel in an Illinois state court for unfair competition.

Brunswick's complaint in this case is that by procuring a patent by fraud and then defending the patent's validity groundlessly in the patent-interference proceeding, Riegel monopolized the production of antistatic yarn in violation of section 2 of the Sherman Act, 15 U.S.C. § 2. The complaint also describes Riegel's misconduct as an attempt to monopolize and as a conspiracy (with Riegel's agents and employees) to monopolize, which are also forbidden by section 2, except that a conspiracy between a corporation and its employees is not actionable under antitrust law. *University Life Ins. Co. v. Unimarc Ltd.*, 699 F.2d 846, 852 (7th Cir. 1983). The district court dismissed the suit on alternative grounds: the complaint fails to state an antitrust cause of action; the suit is barred by the antitrust statute of limitations.

Getting a patent by means of a fraud on the Patent Office can, but does not always, violate section 2 of the Sherman Act. See, e.g., *Walker Process Equipment, Inc. v.*

Food Machinery & Chem. Corp., 382 U.S. 172 (1965); *United States v. Singer Mfg. Co.*, 374 U.S. 174, 196-97 (1963); *American Cyanamid Co. v. FTC*, 363 F.2d 757, 770-71 (6th Cir. 1966); see generally 3 Areeda & Turner, Antitrust Law ¶¶ 707a-b, d, f (1978). A patent entitles the patentee to prevent others from making or selling the patented product or, as here, using the patented production process, and he may be able to use this legal right to restrict competition. If antistatic yarn cannot be produced efficiently other than by using Riegel's patented process, Riegel may be able to exclude competition in the sale of such yarn, in which event it may have "monopoly power"—the "power to control prices or exclude competition." *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 391-92 (1956) (plurality opinion). And to create (or attempt to create, or conspire to create) monopoly power by improper means is to monopolize (or attempt to monopolize, or conspire to monopolize) within the meaning of section 2 of the Sherman Act. See, e.g., *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966).

But "may" is not "does"; and for a patent fraud actually to create or threaten to create monopoly power, and hence violate section 2, three conditions must be satisfied besides proof that the defendant obtained a patent by fraud:

1. The patent must dominate a real market. See *Walker Process Equipment, Inc. v. Food Machinery & Chem. Corp.*, *supra*, 382 U.S. at 177-78; *American Hoist & Derrick Co. v. Sowa & Sons, Inc.*, 725 F.2d 1350, 1366-67 (Fed. Cir. 1984); *Handgards, Inc. v. Ethicon, Inc.*, 601 F.2d 986, 993 n. 13 (9th Cir. 1979). Although the Patent Office will not issue a patent on an invention that has no apparent utility, the invention need not have any commercial value at all (other products or processes may be superior substitutes), and it certainly need not have enough value to enable the patentee to drive all or most substitutes from the market. If a patent has no significant impact in the marketplace, the circumstances of its issuance cannot have any antitrust significance.

2. The invention sought to be patented must not be patentable. If the invention is patentable, it does not matter from an antitrust standpoint what skullduggery the defendant may have used to get the patent issued or transferred to him. The power over price that patent rights confer is lawful, and is no greater than it otherwise would be just because the person exercising the rights is not the one entitled by law to do so. The distinction between a fraud that leads the Patent Office to issue a patent on an unpatentable invention (as in a case where the patent applicant concealed from the Patent Office the fact that the invention already was in the public domain) and one that merely operates to take the patent opportunity away from the real inventor (who but for the fraud would have gotten a valid patent that would have yielded him a royalty measured by the monopoly power that the patent conferred) is supported by analogy to cases holding that fraud on the Patent Office, to be actionable as patent fraud, must be material in the sense that the patent would not have been issued but for the misconduct. See, e.g., *E.I. du Pont de Nemours & Co. v. Berkley & Co.*, 620 F.2d 1247, 1274 (8th Cir. 1980); *Norton v. Curtiss*, 433 F.2d 779, 794 (C.C.P.A. 1970). Equally, for a fraud to be material in an antitrust sense the plaintiff must show that but for the fraud no patent would have been issued to anyone. If a patent would have been issued to someone, the fraud could but have diverted market power from the one who had the right to possess and exploit it to someone else.

3. The patent must have some colorable validity, conferred for example by the patentee's efforts to enforce it by bringing patent-infringement suits. Indeed, some formulations of the antitrust offense of patent fraud make it seem that the offense is not the fraudulent procuring of a patent in circumstances that create monopoly power but the bringing of groundless suits for patent infringement. See, e.g, *Handgards, Inc. v. Ethicon, Inc., supra*, 601 F.2d at 993 and n. 13. This metamorphosis is natural because most patent-antitrust claims are asserted as counterclaims to patent-infringement suits and because the abu-

sive prosecution of such suits could violate the antitrust laws even if the patent had not been obtained by fraud. See, e.g., *id.* at 994. But enforcement actions are not a *sine qua non* of monopolizing by patent fraud. Since a patent known to the trade to be invalid will not discourage competitors from making the patented product or using the patented process, and so will not confer monopoly power, suing an infringer is some evidence that the patent has (or at least the patentee is seeking to clothe it with) some colorable validity that might deter competitors. But it is not indispensable evidence; the concern of section 2 is with exclusion of competition, not with the particular means of exclusion. Indeed, one might argue that just by virtue of being issued, a patent would have some apparent validity and that no more should be necessary. But this would go too far the other way. Since patents are issued in ex parte proceedings, and since by hypothesis the patent applicant had to use fraud to persuade the Patent Office to issue the patent, the patent might not fool anybody in the defendant's market.

Let us see whether these three conditions are satisfied by the complaint in this case. Right off the bat there is a problem with condition (1), as Brunswick's complaint does not allege that the business of making and selling antistatic yarn is an economically meaningful market. However, facts are pleaded that allow an inference that antistatic yarn probably does not have good substitutes, in which event its sole producer could maintain its price significantly above the cost of production and sale.

There is a serious problem, however, with condition (2). Far from alleging that the process for making antistatic yarn that Riegel patented is not patentable, the complaint alleges that it is. Brunswick's only objection is to the patentee's identity; it thinks that it rather than Riegel should be the patentee. But as we have already suggested, to say that a patent should have been issued because the invention covered by it is patentable, but should have been issued to a different person and would have been but for fraud (the breach of the promise to

Brunswick not to disclose its invention), is to say in effect that the patentee stole the patent from its rightful owner; and stealing a valid patent is not at all the same thing, from an antitrust standpoint, as obtaining an invalid patent. Until unmasked in an infringement or cancellation or other proceeding, a patent on an unpatentable invention may create a monopoly by discouraging (through litigation or other means) others from making the patented product, just as a valid patent may, but the monopoly that such a patent creates is illegal, and hence actionable under antitrust law. The theft of a perfectly valid patent, in contrast, creates no monopoly power; it merely shifts a lawful monopoly into different hands. This has no antitrust significance, although it hurts the lawful owner of the monopoly power.

The purpose of the antitrust laws as it is understood in the modern cases is to preserve the health of the competitive process—which means, so far as a case such as this is concerned, to discourage practices that make it hard for consumers to buy at competitive prices—rather than to promote the welfare of particular competitors. This point was implicit in the famous dictum of *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962), that antitrust law (the Court was speaking of section 7 of the Clayton Act, but the point has been understood to be general) is concerned "with the protection of *competition*, not *competitors*" (emphasis in original), and has been repeated with growing emphasis in recent years by this and other courts. See, e.g., *Sutliff, Inc. v. Donovan Cos.*, 727 F.2d 648, 655 (7th Cir. 1984), and cases cited there. True, competitors as well as consumers still have standing to complain about antitrust violations, but that is because competitors are thought to be effective (maybe indispensable) surrogates for the many consumers who do not realize they are the victims of monopolistic practices, or if they do may lack incentives to bring suit because the harm to an individual consumer may be tiny even though the aggregate harm is immense. See Landes, *Optimal Sanctions for Antitrust Violations*, 50 U. Chi. L. Rev. 652, 671-72 (1983);

cf. *In re Industrial Gas Antitrust Litigation*, 681 F.2d 514, 520 (7th Cir. 1982). If no consumer interest can be discerned even remotely in a suit brought by a competitor—if, as here, a victory for the competitor can confer no benefit, certain or probable, present or future, on consumers—a court is entitled to question whether a violation of antitrust law is being charged. See generally Easterbrook, *The Limits of Antitrust*, 63 Tex. L. Rev. 1, 33-39 (1984). If injury to a competitor, caused by wrongful conduct, were enough to bring the antitrust laws into play, the whole state tort law of unfair competition would be absorbed into federal antitrust law; it has not been: "unfair competition, as such, does not violate the antitrust laws." *Sutliff, Inc. v. Donovan Cos.*, *supra*, 727 F.2d at 655; see also *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1107-08 (7th Cir. 1984); *Havoco of America, Ltd. v. Shell Oil Co.*, 626 F.2d 549, 554-59 (7th Cir. 1980).

We cannot find the consumer interest in this case. Brunswick is complaining not because Riegel is gouging the consumer by charging a monopoly price for antistatic yarn, but because Riegel took away a monopoly that rightfully belonged to Brunswick as the real inventor. It is true that when Riegel got its patent Brunswick's patent application was still pending. But there is no suggestion that any other competitors were in the picture. If Riegel had not committed the alleged fraud, Brunswick would have had the whole field to itself—would have had the monopoly of antistatic yarn that it accuses Riegel of having stolen. This would be true even if Brunswick had not tried to get a patent on its process for making antistatic yarn. It still could, and as a rational profit-maximizer presumably would, have tried to license the invention as a trade secret; and a trade secret known only to, and licensed by, one firm may create as much monopoly power as a patent (more, even, if the secret can be kept for more than 17 years).

The nature of the remedy sought in an antitrust case is often, and here, an important clue to the soundness of the antitrust claim. Brunswick is asking, as a main part of the remedy, for an order transferring ownership of the

patent from Riegel to itself. There is no contention that in asking for this Brunswick is motivated by altruism. It wants to make as much money as it can from the patent —as much as Riegel made, or, if possible, even more. There is nothing discreditable in this ambition but we do not see how consumers can benefit from its achievement. The nature of the remedy sought shows that Brunswick, far from contesting the propriety of a patent monopoly of antistatic yarn, makes that propriety the very foundation for the judicial relief that it seeks.

It makes no difference that Brunswick, which as we said is not a textile manufacturer, says that if it owned the patent it would license production to several manufacturers. There would then be more manufacturers of antistatic yarn than there are today, but there would not be more competition if the "competitors" were constrained by the terms of the patent license to charge the monopoly price. And they would be. As a rational profit-maximizer Brunswick would charge its licensees a royalty designed to extract from them all the monopoly profits that the patent made possible; and the licensees would raise their prices to consumers to cover the royalty expense. The price to the consumer would be the same as it is, today, with Riegel the only seller in the market.

It is not a purpose of antitrust law to confer patents or to resolve disputes between rival applicants for a patent. From the standpoint of antitrust law, concerned as it is with consumer welfare, it is a matter of indifference whether Riegel or Brunswick exploits a monopoly of antistatic yarn. Cf. *Products Liability Ins. Agency, Inc. v. Crum & Forster Ins. Cos.*, 682 F.2d 660, 665 (7th Cir. 1982). Indeed, if anything, competitive pricing is more likely if Brunswick loses this suit than if it wins it. If Brunswick is confident that Riegel's patent is invalid, it can go into the antistatic-yarn business itself, with little fear of being held liable for patent infringement; and by entering, it will inject some competition into that market for the first time. Brunswick argues that it could not induce textile manufacturers to produce antistatic yarn under license

from it since they would fear that Riegel would sue them, however baselessly, for patent infringement. But when a patentee (or, as in this case, a patent applicant) licenses his patent to other firms, he typically agrees to indemnify them for any costs incurred in patent-infringement suits brought against them. Brunswick, a large corporation, can afford to indemnify its licensees and would promise to do so if it really believed that it and not Riegel was the lawful owner of the patent.

Our analysis is supported by a more illustrious case bearing Brunswick's name—*Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977), which held that an antitrust plaintiff cannot prevail merely by showing that the defendant violated the antitrust laws and the violation hurt the plaintiff; he must also show that the injury is the sort of thing the antitrust laws seek to discourage, such as price above the competitive level and output below it. It would seem to follow that if a form of wrongdoing (stealing a patentable process) cannot cause antitrust injury to anyone, because it has no tendency to raise prices or reduce output or do anything else that hurts consumer or other interests protected by the antitrust laws, it does not violate those laws at all. It is then not a matter of the case having been brought by the wrong plaintiff, as in *Brunswick*, but of there being no possible plaintiff because the defendant's conduct has no tendency to injure anyone intended to be benefited by the antitrust laws. The Fifth Circuit so held recently in a case where the plaintiff had complained that the defendant was preventing it from exploiting a natural monopoly of the resale distribution of electricity. *Almeda Mall, Inc. v. Houston Lighting & Power Co.*, 615 F.2d 343, 353 (5th Cir. 1980); see also *Mishler v. St. Anthony's Hospital Systems*, 694 F.2d 1225, 1228 (10th Cir. 1981).

The third condition for a patent fraud to violate section 2 of the Sherman Act—that the defendant has made efforts to give the color of validity to his patent on an unpatentable invention—cannot be met in a case where the plaintiff himself asserts that the underlying

invention is patentable. This reinforces our conclusion that the complaint states no antitrust cause of action.

But in so concluding we have not considered any events after Riegel received the patent in 1972, though Brunswick argues that Riegel's subsequent conduct in defending itself in the patent-interference proceeding also violated section 2. This argument is also a cornerstone of Brunswick's challenge to the district court's alternative holding that Riegel's action was barred by the statute of limitations—a holding we shall now consider in part for the light it may cast on the more fundamental issue of the sufficiency of the complaint.

Unless tolled for one reason or another, the four-year antitrust statute of limitations in section 4B of the Clayton Act, 15 U.S.C. § 15B, expired in 1976 on any cause of action that Brunswick might have had by reason of Riegel's alleged fraud, because the fraud had succeeded in 1972, when Riegel got its patent, yet this suit was not brought till 1982. Brunswick has abandoned its argument that the statute of limitations was tolled because of fraudulent concealment, but makes other arguments for extending the statute. One is that the Patent Office has primary jurisdiction over any dispute over patent validity, and that as a result the statute of limitations does not begin to run till its proceedings are final. Although this argument may seem to lead to the bizarre conclusion that Brunswick's suit is premature, because judicial review of the patent-interference proceeding is not yet complete, Brunswick was entitled to file this antitrust suit as a protective action so that if its primary-jurisdiction argument failed its suit would not be time-barred. And that is the spirit in which Brunswick filed; the only discovery it proposed to conduct before the patent-interference proceeding was resolved was deposing elderly witnesses who might die or whose memories might fade before the case was tried.

Mt. Hood Stages, Inc. v. Greyhound Corp., 616 F.2d 394 (9th Cir. 1980), the case on which Brunswick relies for this ground for extending the statute of limitations, holds that

the antitrust statute of limitations does not begin to run until the conclusion of any administrative proceedings that the plaintiff is required to pursue by the doctrine of primary-jurisdiction. This is a surprising holding because the doctrine of primary jurisdiction (as distinct from that of exhaustion of administrative remedies) ordinarily comes into play *after* suit is filed and the statute of limitations is thus stopped from running, when the defendant asks that the suit be stayed because a potentially controlling question is within an agency's exclusive jurisdiction to decide, at least in the first instance. See, e.g., *City of Peoria v. General Electric Cablevision Corp.*, 690 F.2d 116, 120-21 (7th Cir. 1982). Mt. Hood complained that a competing bus company had tried to drive it out of business by buying up bus companies with which it had connecting routes and then cancelling the connections so that it would be isolated. Although the acquisitions had been approved by the Interstate Commerce Commission and by being approved had been immunized from an attack under the antitrust laws, Mt. Hood asked the Commission to rescind its approval on the ground that Greyhound had obtained it through misrepresentations; and it was only after the Commission accepted the petition and rescinded its earlier approval that Mt. Hood filed its antitrust suit. It could have sued before asking the Commission to rescind the original order, but had it done so Greyhound would have argued that the acquisitions were immune, Mt. Hood would have countered that the immunity rested on fraud, and the court would then (perhaps) have stayed the suit on the ground that the question whether the approval of the acquisitions had been fraudulently procured was within the primary jurisdiction of the ICC, requiring Mt. Hood to present its claim to the Commission before the court could resolve the issue of antitrust immunity.

To allow the statute of limitations to be tolled on the basis of a defense that might be raised if the suit were filed on time is unconventional; and although, since it was very likely that a dispositive issue would have to be fought out in the Commission before the court could act, it may

have made little difference whether Mt. Hood brought the suit within four years and then interrupted it for a proceeding before the ICC, or waited till that proceeding was over before suing, it could have made some difference, as the facts of the present case show. The patent-interference proceeding began three years after Brunswick's cause of action arose, which means that the statute of limitations had one year left to run. But for *Mt. Hood*, Brunswick would have had to sue within another year, that is, while the patent-interference proceeding was going on. The suit would have been stayed but would have resumed immediately upon the conclusion of that proceeding. Under the principle of *Mt. Hood* (if applicable to patent-interference proceedings), Brunswick would have had a year to bring suit *after* the conclusion of the interference proceeding. Considering that agency proceedings can greatly prolong antitrust litigation when primary jurisdiction is invoked—especially since the agency proceedings are not considered complete for these purposes until judicial review of the agency's determination is complete, see, e.g., *Ricci v. Chicago Mercantile Exchange*, 409 U.S. 289, 306 (1973)—we question the wisdom of allowing a plaintiff to wait for the unexpired portion of the statute of limitations to expire after the agency proceedings are complete before he sues, rather than suing if need be while those proceedings are going on and staying the suit till they have been completed.

But sound or unsound, the principle of *Mt. Hood* is not applicable to this case. It certainly would not apply if the priority of the conflicting patent applications, Brunswick's and Riegel's, were the only issue in the patent-interference proceeding, for that is not a potentially dispositive issue in the antitrust case. Brunswick's antitrust claim is that Riegel, by breaking its contract not to disclose Brunswick's invention, defrauded Brunswick of its right to patent the process it had invented for producing antistatic yarn. Even if the Patent Office decided that Riegel's patent was valid, Riegel might still have committed a fraud against Brunswick by applying for the

patent itself. Cf. *Hilborn v. Dann*, 546 F.2d 401, 403 (C.C.P.A. 1976). True, the Patent Office might find, to the contrary, that Riegel's patent was invalid and Brunswick's patent application valid. And it might seem that if Brunswick could get all the relief it wanted from the Patent Office it ought not have to bring suit before it knew whether it had gotten that relief. But there was no way that Brunswick could obtain complete relief from the Patent Office; the Patent Office could not make Riegel compensate Brunswick for the money that Brunswick had lost because Riegel had gotten a patent first. Thus, if priority of invention were the only issue in the patent-interference proceeding, that proceeding could provide at best some partial and parallel relief to the antitrust suit but would not be a condition precedent to it (as in *Deltec, Inc. v. Laster*, 326 F.2d 443, 444 (6th Cir. 1964) (per curiam)), or a complete substitute for it, or even a proceeding that "promises to be of material aid in resolving" a potentially dispositive issue, *Ricci v. Chicago Mercantile Exchange*, *supra*, 409 U.S. at 302, such as the issue of antitrust immunity in *Ricci* and in *Mt. Hood*. The fact that Brunswick wanted to litigate the patent-interference proceeding to conclusion before actively litigating the present suit does not show that that proceeding "promise[d] to be of material aid in resolving" a potentially dispositive issue, but only that Brunswick had a preferred sequence for litigating its various claims (now pending in three different courts) against Riegel.

But all this assumes that priority is the only issue in a patent-interference proceeding, and we know from the fact that the Patent Office found that Brunswick's patent application was invalid that it is not. The Board of Patent Interferences is allowed to review a broad range of issues "ancillary" to priority. See 1 Rosenberg, *supra*, § 10.02[5][c], at p. 10-47. And the validity of Brunswick's patent is, as Brunswick has framed its antitrust suit, a potentially dispositive issue in the antitrust suit, since that whole suit is bottomed on the claim that Riegel took from Brunswick a patent opportunity that rightfully belonged to it. However, this court has held recently that

patent validity is not within the Patent Office's primary jurisdiction. See *Johnson & Johnson, Inc. v. Wallace A. Erickson & Co.*, 627 F.2d 57, 61-62 (7th Cir. 1980). The validity of a patent is a question of law, which a court decides with some but not great deference to decisions of the Patent Office. *Johnson & Johnson* was not an antitrust case, but we think its teachings apply even more strongly to antitrust cases. These cases are already sufficiently protracted without our making them more so by adopting a new principle under which patent-antitrust cases could be delayed indefinitely for proceedings before the Patent Office. As for the issue of fraud, apparently that was never presented to the Patent Office as part of the interference proceeding; and we doubt whether the Patent Office would be interested in adjudicating a dispute arising not from anything done in Patent Office proceedings but from Riegel's agreement with Brunswick not to disclose Brunswick's invention.

Brunswick's separate argument that its damages were insufficiently definite to require it to bring suit back in 1972 when Riegel got its patent rests on *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 338-42 (1971), which held that if the victim's damages are too speculative to be computed at the time of the antitrust violation, the victim can (must, really) wait to sue until they become ascertainable. In *Zenith* itself, the calculation of damages at the time of the violation (or even of the trial) would have required "predict[ing] market conditions and the performance of one competitor in that market five to 10 years hence." *Id.* at 342. Calculating Brunswick's damages back in 1972 would have required predicting Riegel's success in selling antistatic yarn.

But *Zenith* has not been understood to toll the antitrust statute of limitations in every case where the plaintiff is seeking damages for being excluded from a market the profitability of which will be revealed only in the fullness of time. See, e.g., *Charlotte Telecasters, Inc. v. Jefferson-Pilot Corp.*, 546 F.2d 570, 573 (4th Cir. 1976); *Ansul Co. v. Uniroyal, Inc.*, 448 F.2d 872, 885 (2d Cir. 1971);

Landon v. Twentieth Century-Fox Film Corp., 384 F. Supp. 450, 459 (S.D.N.Y. 1974). Exclusion from a market is a conventional form of antitrust injury that gives rise to a claim for damages as soon as the exclusion occurs (which means, in this case, in 1972), even though, in the nature of things, the victim's losses lie mostly in the future. See, e.g., 2 Areeda & Turner, Antitrust Law 232-33 (1978). In some cases, such as *Zenith* itself, or our recent decision in *Ohio-Sealy Mattress Mfg. Co. v. Kaplan*, 745 F.2d 441, 450 (7th Cir. 1984), the plaintiff may be able to show that his future losses were so speculative at the time of exclusion that a judge or jury would not have been allowed to award damages for those losses at that time, in which event the plaintiff may and indeed must wait to sue. (In *Kaplan*, to calculate damages would have required predicting how the defendants would resolve a number of legal questions that faced them; if the defendants answered them in a particular way, the anticompetitive activities would be discontinued and thus cease to hurt the plaintiff.) But unless special circumstances preclude, as excessively speculative, an award of damages based on predicted as distinct from realized losses due to the defendant's misconduct, the statute of limitations is not tolled simply in order to wait and see just how well the defendant does in the market from which he excluded the plaintiff. Otherwise it would be tolled indefinitely in a very large class of antitrust suits.

The *Zenith* principle is particularly out of place in this case; for the nature of Brunswick's complaint is such that it could have gotten complete compensation in a suit brought in 1972 with much less uncertainty than is usual in antitrust damage actions. Brunswick could and did ask for Riegel's profits from the sale of antistatic yarn up to the date of trial and for an assignment of Riegel's patent rights to it, which would have enabled Brunswick to obtain the future profits generated by the patent by licensing it to textile manufacturers—maybe to Riegel itself.

If the complaint can fairly be read to charge misconduct after 1972, when Riegel got its patent, this could provide another and better ground for tolling the statute of limitations, and also for finding in the later conduct some indication that a genuine antitrust violation, occurring within the limitations period, is being charged. But the only thing that happened after 1972 is that Riegel, when brought into the patent-interference proceeding initiated by the Patent Office, defended itself. Brunswick argues that in doing so Riegel engaged in exclusionary conduct that, when combined with the original fraud, establishes an antitrust violation that continued into the four-year limitations period that began in 1978; and it points out that if a continuing violation extends into the statutory period, the victim is entitled to complain about the whole violation, no matter how long ago it began (see, e.g., *Weber v. Consumers Digest, Inc.*, 440 F.2d 729, 731 (7th Cir. 1971))—a rule necessary to head off multiple suits growing out of the same events. But if, as we stated earlier, the original fraud was not an antitrust violation because it had no tendency to harm consumer interests, we do not see how Riegel's refusing to acknowledge that fraud in the patent-interference proceeding could be an antitrust violation; it might serve to perpetuate a fraud, but a fraud harmless to the interests protected by the antitrust laws.

Moreover, while harassing competitors by litigation that can fairly be described as malicious prosecution or abuse of process can violate the antitrust laws, see, e.g., *Grip-Pak, Inc. v. Illinois Tool Works, Inc.*, 694 F.2d 466, 470-73 (7th Cir. 1982), we are pointed to no case where simply defending oneself in a proceeding brought by another has been held to be actionable. If it were, the following bizarre sequence would be implied: A gets a patent; B, a rival inventor, sues A in state court for unfair competition in having acquired the patent by fraud; years later B brings an antitrust suit against A, charging that A's refusal to cave in in the state-court action brought by B was exclusionary conduct forbidden by the antitrust laws.

Although the patent-interference proceeding was not instituted by Brunswick, but by the Patent Office, this is a technical distinction. Brunswick was the moving party, really, because the patent-interference proceeding was started only after Brunswick, by referring to Riegel's patent in Patent Office filings made in connection with Brunswick's own patent application, made the interference starkly apparent to the Patent Office. See 1 Rosenberg, *supra*, § 10.02[3], at p. 1032. You cannot start a suit, as Brunswick in effect did here, and then sue the defendant for refusing to default.

Brunswick argues, however, not only that Riegel should not have defended itself at all but also that in doing so Riegel falsified documents and engaged in other unethical conduct. We doubt that an antitrust case is the proper forum for deciding questions of legal ethics. But even if defending against a competitor's lawsuit could be (maybe because of the tactics employed) the kind of aggressive conduct that might in other circumstances violate the antitrust laws, it could not here, given our earlier point that all Brunswick is seeking is Riegel's profits plus the transfer of Riegel's patent to itself. Whoever owns the patent, the consumer will have to pay a royalty measured by the monopoly power conferred by the patent—provided the invention really is patentable, as Brunswick vigorously asserts it is.

AFFIRMED.

WOOD, *Circuit Judge*, concurring. I join in the result reached in so much of Judge Posner's opinion as holds that the alleged cause of action is barred by the statute of limitations. Judge Aspen's Memorandum Opinion and Order in the district court, *Brunswick Corp. v. Riegel Textile Corp.*, 578 F.Supp. 893 (N.D.Ill. 1983), held that the cause of action was barred by the statute of limitations, 15 U.S.C. Section 156, that no exception was applicable, and that there was no continuing antitrust violation to bring it within that statute. I would affirm on the basis of Judge

Aspen's opinion. Therefore, although enlightening, I see no need for much of the antitrust-economic-patent discussion in Judge Posner's opinion.

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Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit

USCA 50234—Pandick Midwest, Inc., Chicago—12-19-84—450

UNITED STATES DISTRICT COURT

Northern District of Illinois

Eastern Division

BRUNSWICK CORPORATION,
a Delaware corporation,
Plaintiff,

v.

RIEGEL TEXTILE
CORPORATION,
a Delaware corporation,
Defendant.

NO. 82 C 4374

MEMORANDUM OPINION AND ORDER

MARVIN E. ASPEN, District Judge:

Plaintiff Brunswick Corporation ("Brunswick") sued Riegel Textile Corporation ("Riegel") pursuant to federal antitrust statutes as well as state law. Jurisdiction is asserted pursuant to 28 U.S.C. § 1337 and the pendent jurisdiction doctrine. Presently before the Court is Riegel's motion to dismiss Counts III, IV and V pursuant to Fed.R.Civ.P. 12(b)(6). Riegel also seeks dismissal of the state law claims set forth in Counts I, II and VI. For reasons set forth below, Riegel's motion is granted.

In considering motions to dismiss, we take as true all material allegations of fact contained in Brunswick's complaint. A complaint should not be dismissed, moreover, "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Cruz v. Beto,* 405 U.S. 319, 322, 92 S.Ct. 1079, 1081 (1972); *Conley v. Gibson,* 355 U.S. 41, 45-46, 78 S.Ct. 99, 102 (1957).

Facts

Brunswick claims that in 1967, it developed a blending process which permitted metal fibers to be combined with

conventional fibers to make an antistatic yarn for static-free garments. In 1968, Brunswick and Riegel entered into an agreement and confidential relationship whereby Brunswick agreed to disclose its blending process to Riegel, and to refrain from disclosing the process to any other textile company for a year after Riegel mastered the blending process. Riegel agreed to use Brunswick metal fibers, and not to disclose the process to others. Brunswick, through an employee, filed a patent application which included a group of claims relating to its blending process in 1970. In that same year, Brunswick alleges that two Riegel employees fraudulently filed a patent application concerning the blending process; a patent was issued to the Riegel employees in 1972, and Brunswick asserts that the trade secret status of its blending process was thereby destroyed.

In 1975, the Patent Office declared a patent interference proceeding to determine the priority of invention between Brunswick's employee and Riegel's employees.[1] Brunswick claims that it initially believed that Riegel's patents might have been based upon an earlier independent invention. In 1977, however, during the course of the Patent Office interference

[1] During the pendency of this litigation, the Board of Patent Interferences issued a decision concerning the priority of invention of the blending process. The decision, issued November 4, 1983, is subject to appeal within sixty days. The Board declined to decide whether Riegel's employees obtained their patent fraudulently, but it did hold that Brunswick's employee established a date of invention prior to his benefit date for subject matter in 1, 2, 4 and 7 claims Brunswick's employee, however, was found to have no right to make claim 16 (Count I). Riegel's employee did not, moreover, establish conception or a reduction to practice of certain counts.

In 1972, Riegel's employees once again filed a patent application containing claims of invention concerning antistatic yarn and fabrics. While the patent issued in 1974, a patent interference proceeding concerning the claims in the second patent was dissolved in 1977, holding that all claims in the second patent were unpatentable.

proceedings, Brunswick asserts it learned that Riegel's procurement of the patent was fraudulent.

Count I avers that the aforementioned acts by Riegel constitute malicious interference with prospective economic advantage, while Count II claims that Riegel's patent application and involvement in the patent interference proceeding are abuse of process. In Count III, Brunswick asserts that the patents were fraudulently obtained to restrain trade, as part of a combination and conspiracy, in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. Count IV claims a conspiracy to monopolize, an attempt to monopolize and an unlawful monopolization, in violation of Section 2 of the Sherman Act, 15 U.S.C. § 2. Count V asserts that Riegel's allegedly unlawful acquisition of Brunswick's blending process constitutes an acquisition of assets in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18. Finally, Count VI asserts a claim for breach of contract. Riegel has made a number of arguments in support of its motion to dismiss, to which we now turn.

Statute of Limitations

According to 15 U.S.C. § 15b,

> (a)ny action to enforce any cause of action under sections 15 or 15a of this title shall be forever barred unless commenced within four years after the cause of action accrued.

The Supreme Court has recognized various grounds for allowing antitrust lawsuits to be brouqht more than four years after the events which initially create a cause of action. Thus, if, when a defendant's antitrust act originally occurred, the plaintiff's damages were speculative or unprovable, suit may be brought more than four years after the antitrust act. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 339-40, 91 S.Ct. 795, 806-07 (1971). Additionally, if a plaintiff refrains from suit during the limitations period because of inducement by the defendant, *Glus v. Brooklyn Eastern Termi-*

nal, 359 U.S. 231, 79 S.Ct. 760 (1959), or because of fraudulent concealment, *Holmberg v. Armbrecht,* 327 U.S. 392, 66 S.Ct. 582 (1946), the limitations period will be tolled. *See also, Allis-Chambers Mfg. Co. v. Commonwealth Edison Co.,* 315 F.2d 558 (7th Cir. 1963). More recently, the Ninth Circuit has developed an equitable tolling doctrine to toll the statute of limitations, *Mt. Hood Stages v. Greyhound Corp.,* 616 F.2d 394 (9th Cir. 1980), *cert. denied,* 449 U.S. 831, 98 S.Ct. 2370 (1980).

Riegel claims that Brunswick alleges no actionable anticompetitive conduct by Riegel within the four years preceding the complaint, which was filed on July 15, 1982. In response, Brunswick makes three arguments in an effort to toll the statute of limitations: (1) equitable tolling; (2) fraudulent concealment; and (3) the speculative nature of Brunswick's damages at the time of violation. We will consider each of these arguments in turn.

Equitable Tolling

In *Mt. Hood Stages v. Greyh ound Corp.,* 616 F.2d 394 (9th Cir. 1980), *cert. denied,* 449 U.S. 831, 98 S.Ct. 2370 (1980), the Ninth Circuit held that the plaintiff's resort to an administrative proceeding with the Interstate Commerce Commission, in which plaintiff objected to Greyhound's acquisition of other bus companies, tolled the statute of limitations for purposes of a subsequent antitrust action against Greyhound.[2] Central to the

[2] Prior to the Ninth Circuit's holding, the Supreme Court had remanded the case to the Ninth Circuit to consider whether the statute of limitations was tolled by equitable principles. Greyhound Corp. v. Mt. Hood Stages, Inc., 437 U.S. 322, 337 n.21, 98 S.Ct. 2370, 2378 n.21 (1978). In his concurring opinion, Chief Justice Burger declared that equitable tolling was particularly appropriate in the context of 15 U.S.C. § 15b, since the addition of that section was "essentially a 'procedural' change." *Id.* at 338, 98 S.Ct. at 2379 (1978) (Burger, Ch.J., concurring).

holding in *Mt. Hood* was the fact that a key issue raised by the plaintiff's antitrust suit involved matters within the Interstate Commerce Commission's primary jurisdiction. *Mt. Hood,* 616 F.2d at 397-98. Thus, prior to their consideration by a court, the Commission was required to resolve these issues.

In the instant case, Brunswick asserts that the patent interference proceeding in the present case suspended the statute of limitations. However, patent validity is neither a matter within the primary jurisdiction of an administrative agency nor a public issue of regulatory concern. *Johnson & Johnson v. Wallace A. Erickson & Co.,* 627 F.2d 57, 61-62 (7th Cir. 1980). The factual adjudications of the Patent Office, moreover, are not necessarily conclusive. *Id.* The *Mt. Hood* Court's careful balancing of purposes behind the Clayton Act and the Interstate Commerce Act renders it distinguishable from the present case, and we decline to apply the equitable tolling doctrine. *Cf., Corson v. First Jersey Securities, Inc.,* 537 F.Supp. 1263 (D.N.J. 1982) (SEC investigation does not toll statute of limitations on private enforcement action).

Fraudulent Concealment

In an effort to fall within the fraudulent concealment exception to the statute of limitations, Brunswick claims that the first evidence that Riegel's 1970 patent application was fraudulent appeared during a 1980 deposition. Prior to that date, Brunswick claims that it reasonably relied upon Riegel's denial of wrongdoing and Riegel's claim that it had developed an independent invention.

A party seeking the benefit of rules in avoidance of statutes of limitations has the burden of proof to establish his or her entitlement to such rules. *Akron Presform Mold Co. v. McNeil Corp.,* 496 F.2d 230, 233 (6th Cir. 1974), *cert. denied,* 419 U.S. 997, 95 S.Ct. 310 (1974). Thus, to invoke the fraudulent concealment doctrine, Brunswick must be able to produce

evidence that Riegel concealed the basic facts disclosing the existence of a cause of action, and that Brunswick remained in ignorance of those facts through no fault of their own. *Baker v. F & F Investment,* 420 F.2d 1191, 1199 (7th Cir. 1970), *cert. denied,* 400 U.S. 821, 91 S.Ct. 42 (1970). Due diligence by Brunswick in attempting to discover the relevant facts is therefore required. *Charlotte Telecasters, Inc . v. Jefferson-Pilot Corp.* 546 F.2d 570, 574 (4th Cir. 1976). Particularity in pleading fraudulent concealment has also been required. *Rutledge v . Boston Woven Hose & Rubber Co.,* 576 F.2d 248, 250 (9th Cir. 1978); *Laundry Equipment & Sales Corp. v. Borg-Warner Corp.,* 334 F.2d 788 (7th Cir. 1964).

In paragraph 24 of its complaint, Brunswick sets forth a detailed explanation of why it did not learn of Riegel's alleged fraudulent conduct until October, 1977.[3] But October, 1977, is

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[3] According to ¶ 24,

Not until October, 1977 did BRUNSWICK, in the course of the Patent Office Interference proceedings, become aware that RIEGEL's patent and RIEGEL's defense in the interference proceedings were not merely the result of an erroneous good faith claim of independent development, but that RIEGEL had willfully and tortiously engaged in a scheme to misappropriate to itself BRUNSWICK's Blending Process by fraudulently applying for a patent and continuing the fraud by its conduct in the interference proceeding. BRUNSWICK learned at this time that RIEGEL, and its attorneys, at all times relevant hereto knew or should have known that RIEGEL had not in fact developed any new advancement of technology in the Blending Process, other than that which BRUNSWICK had disclosed to RIEGEL in the course of the confidential relationship; and that the purported inventors had made no contribution toward the invention of the blending process which RIEGEL claimed in its patent application, but merely had pirated and copied that which had been disclosed to RIEGEL by BRUNSWICK in the course of the confidential relationship. BRUNSWICK had no reasonable means of learning of RIE-

(Footnote continued on following page.)

more than four years prior to the filing of the complaint in the present matter. From the complaint, it is apparent that Brunswick either knew or could have discovered, through reasonable diligence, the facts upon which its cause of action is

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(Footnote continued from preceding page.)

GEL's fraudulent and willful misconduct until the following incidents occurred in the course of the prosecution of now pending Patent Interference No. 98,935 which relates to RIEGEL's "Antistatic Yarn Production" Patent (Exhibit A):

(a) In or about October, 1977 BRUNSWICK was informed that RIEGEL obtained all of its information concerning the blending of antistatic yarn from BRUNSWICK in 1968, and that RIEGEL knew and always had known that the purported inventors of the RIEGEL "Antistatic Yarn Production" Patent (Exhibit A) made no independent invention.

(b) In October, 1977 BRUNSWICK was also informed that in November, 1969, after BRUNSWICK had taught RIEGEL the Blending Process, top level management officials at RIEGEL instructed other members of RIEGEL management and staff to do whatever they could to obtain a patent on BRUNSWICK's Blending Process in order to exclude RIEGEL's competitors in the manufacture of antistatic fabric.

(c) In August, 1981, BRUNSWICK was informed that everything that the plant foreman of RIEGEL, who was in charge of blending metal fibers and textile fibers from 1968-74, knew about the manufacture of antistatic fibers had been taught to him by BRUNSWICK personnel, and that no engineers or technicians from RIEGEL had ever suggested or implemented any modification in the BRUNSWICK Blending Process.

(d) In September, 1981, BRUNSWICK learned that, although RIEGEL's employee Goodbar had represented to the Patent Office in Patent Interference No. 99,227 that the purported invention of the antistatic yarn and blending process at RIEGEL was not made until January of 1970, Goodbar already had antistatic fabric in his possession in July of 1969, obviously made from yarn using the BRUNSWICK Blending Process.

premised in 1977.[4] Where a complaint reveals that certain claims are barred from recovery by limitations, they may be disposed of on a motion to dismiss. *Baker v. F & F Investments,* 420 F.2d 1191, 1198 (7th Cir. 1970), *cert. denied,* 400 U.S. 821, 91 S.Ct. 42 (1970); *Kincheloe v. Farmer,* 214 F.2d 604, 605 (7th Cir. 1954), *cert. denied,* 348 U.S. 920, 75 S.Ct. 306 (1955). As a result, Brunswick's complaint itself indicates that the doctrine of fraudulent concealment is unavailable as a means of tolling a statute of limitations.

Speculative Damages

According to Brunswick, its damages were speculative and unproveable at the time of Riegel's initial violation, and therefore the statute of limitations does not bar this action. Brunswick claims that it intended to enter into a new market licensing textile companies with its blending process, but that it was prevented from doing so when Riegel obtained its patent. Because antistatic yarn was a new concept in 1972, with no predictability as to its market success, Brunswick asserts that to estimate a market and royalty income in 1972 would have been

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[4] As another possible basis for our holding, we note that Brunswick certainly knew the nature of its blending process as early as 1973. It had previously taught the process to Riegel. Brunswick, moreover, is charged with knowledge of the process upon which Riegel obtained its patent. Sontag Chain Stores Co. v. National Nut Co., 310 U.S. 281, 295, 60 S.Ct. 961, 967 (1940).

Riegel's patent was issued in 1972. Brunswick thus may have known of its cause of action prior to 1977. The fact that Riegel allegedly rejected accusations of its culpability would not automatically toll the statute of limitations; rather, a plaintiff's reliance upon such a denial must be reasonable in order to assert fraudulent concealment. Rutledge v. Boston Woven Hose and Rubber Co., 576 F.2d 248, 250 (9th Cir. 1978). Whether any reliance on the part of Brunswick was reasonable is an issue upon which we express no opinion.

speculative. Therefore, Brunswick claims that its cause of action did not accrue until 1980, when deposition testimony allegedly confirmed Brunswick's suspicion that Riegel stole Brunswick's invention.

In *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 90 S.Ct. 795 (1971), the Supreme Court held that an antitrust plaintiff may recover damages occurring within the statutory limitations period that are the result of conduct prior to that period if, at the time of the conduct, these damages were speculative or incapable of proof. *Id.* at 338-42, 91 S.Ct. at 806-08. We do not believe that Brunswick's damages were speculative in 1972 when the patent was issued to Riegel. The relief Brunswick seeks includes an assignment of Riegel's patent and the right to exploit the *entire market* for products produced by the blending process. Such damages were not speculative or incapable of proof in 1972. Moreover, the *Zenith* exception to statute of limitations operates to toll the statute of limitations where damages are speculative, and not where the existence of the cause of action itself was speculative. *Akron Pressform Mold Co. v. McNeil Corp.*, 496 F.2d 230, 234 (6th Cir. 1974). As a result, the *Zenith* exception to the statute of limitations is inapposite.

Continuing Antitrust Violations

Brunswick also claims that Riegel's wrongful appropriation and use of Brunswick's blending process constitutes a continuing antitrust violation, which allows Brunswick to sue for damages sustained in the four-year period preceding the filing of this suit. In response, Riegel asserts that the fraudulent procurement of a patent cannot constitute a violation of the antitrust laws; thus, Riegel's conduct cannot be classified as a continuing antitrust violation.

In *Walker Process Equipment v. Food Machinery & Chemical Corp.*, 382 U.S. 172, 86 S.Ct. 347 (1965), the Supreme

Court recognized that the enforcement of a patent procured by intentional fraud on the patent office may violate ¶ 2 of the Sherman Act. *Id.* at 174, 86 S.Ct. at 349. According to Brunswick, Riegel's conduct is equivalent to enforcement of the patent.[5] However, absent allegations that Riegel enforced its patent by exclusionary infringement suits or threats of suit, in addition to fraudently procuring the patent, Brunswick's claim is not actionable under the antitrust laws. *Id.; GAF Corp. v. Eastman Kodak,* 519 F.Supp. 1203, 1234 (S.D.N.Y. 1981); *Struthers Scientific and International Corp. v. General Foods Corp.,* 334 F.Supp. 1329, 1331-32 (D.Del. 1971), *accord, Oetiker v. Jurid Werke GMBH,* 671 F.2d 596 (D.C. Cir. 1982). Riegel procured the patent in 1972; Brunswick alleges no exclusionary infringement suits, or threats of any such suits on the part of Riegel subsequent to that time which might constitute continuing antitrust violations.

Accordingly, because we conclude that Counts III, IV and V of Brunswick's complaint are barred by the statute of limitations and fail to state a claim for a continuing antitrust violation, these counts are dismissed.[6] The pendent state law claims in Counts I, II and VI are also dismissed. *United Mine Workers of America v. Gibbs,* 383 U.S. 715, 726, 86 S.Ct. 1130, 1139 (1966). It is so ordered.

/s/ MARVIN E. ASPEN
Marvin E. Aspen
United States District Judge

DATED 12/19/83

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[5] Brunswick cites Riegel's contesting of Brunswick's rights in the patent interference proceedings, Riegel's issuance of a license for the process patent and technology to another firm, and Riegel's citation in advertising of its patent support of this proposition.

[6] Our resolution of the present matter renders unnecessary a discussion of Riegel's additional arguments in support of dismissing Counts III, IV and V.

JUDGMENT IN A CIVIL CASE

UNITED STATES DISTRICT COURT
Northern District of Illinois

CASE TITLE: Brunswick Corporation,

v.

Riegel Textile Corporation

DOCKET NUMBER: 82 C 4374

NAME OF JUDGE OR MAGISTRATE: Marvin E. Aspen

Decision by Court. This action came to hearing before the Court with the judge (magistrate) named above presiding. The issues have been heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

that Riegel's motion to dismiss Counts III, IV and V pursuant to Fed.R.Civ.P. 12(b)(6) is granted, and Riegel's motion to dismiss the state law claims as set forth in Counts I, II and VI is also granted.

CLERK: H. Stuart Cunningham

DATE

BY DEPUTY CLERK:
Mark V. Tortorici /s/ MARK V. TORTORICI

12-19-83

UNITED STATES DISTRICT COURT

Northern District of Illinois

Eastern Division

Name of Presiding Judge, Honorable Marvin E. Aspen

Cause No. 82 C 4374 Date Feb. 9, 1984

Title of Cause, Brunswick v. Riegel Textile Corp
Brief Statement of Motion

The rules of this court require counsel to furnish the names of all parties entitled to notice of the entry of an order and the names and addresses of their attorney. Please do this immediately below (separate lists may be appended).

Names and Addresses
of moving counsel

Representing

Names and
Addresses of
other counsel
entitled to
notice and names
or parties they
represent.

Reserve space below for notations by minute clerk

Brunswick's motion for reconsideration is denied. Riegel's Motion under Local Rule 2.31 is denied, since the instant case is not pending before this Court. It is so ordered.

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

January 18, 1985

Before

Hon. HARLINGTON WOOD, JR., Circuit Judge

Hon. RICHARD A. POSNER, Circuit Judge

Hon. WILLIAM J. CAMPBELL, Senior District Judge*

BRUNSWICK CORPORATION,
a Delaware corporation,
Plaintiff-Appellant,
No. 84-1334 vs.
RIEGEL TEXTILE
CORPORATION,
Defendant-Appellee.

Appeal from the United States District Court, Northern District of Illinois, Eastern Division
No. 82 C 4374.
Marvin E. Aspen, Judge.

ORDER

On consideration of the petition for rehearing with a suggestion for rehearing en banc filed in the above-entitled cause by plaintiff-appellant, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

* Hon. William J. Campbell of the Northern District of Illinois, sitting by designation.

UNITED STATES DISTRICT COURT

For The Northern District of Illinois

Eastern Division

BRUNSWICK CORPORATION,
a Delaware corporation,
Plaintiff,

v.

RIEGEL TEXTILE
CORPORATION,
a Delaware corporation,
Defendant.

No. 82 C 4374
JURY DEMAND

COMPLAINT

Plaintiff, BRUNSWICK CORPORATION ("BRUNSWICK"), by its attorneys, Erwin C. Heininger and Ned Robertson, complain of the defendant, RIEGEL TEXTILE CORPORATION ("RIEGEL"), alleging as follows:

JURISDICTION AND VENUE

1. This action arises under the provisions of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2; Section 4 of the Clayton Act, 15 U.S.C. § 15; Section 7 of the Clayton Act, 15 U.S.C. § 18; Section 12 of the Clayton Act, 15 U.S.C. § 22; Section 16 of the Clayton Act, 15 U.S.C. § 26 and the principles of common law.

2. This Court has jurisdiction by virtue of the provisions of 28 U.S.C. § 1337 and the doctrine of pendent jurisdiction.

PARTIES

3. The plaintiff BRUNSWICK was at all relevant times and is a business corporation organized and existing under the

laws of the State of Delaware, with its principal place of business located in Skokie, Illinois.

4. The defendant RIEGEL was at all relevant times and is a business corporation organized under the laws of the State of Delaware, with its principal place of business located in Greenville, South Carolina. RIEGEL does business within this judicial district and currently maintains offices in Park Ridge, Illinois.

COUNT I

5. BRUNSWICK, among other activities, has been and is engaged in the manufacture and sale of metal fibers. In 1967, BRUNSWICK conceived and developed a blending process (herein referred to as "the Blending Process" or the "BRUNSWICK Blending Process") which permitted metal fibers to be combined with conventional synthetic or natural fibers to make an antistatic yarn which could be used to manufacture antistatic fabric. Antistatic fabric is used for, among other purposes, the manufacture of static free garments for use in hospital operating rooms and other areas which contain atmospheres of volatile gas that could explode as a result of static electricity generated by conventional garments.

6. BRUNSWICK'S Blending Process was the unique property of BRUNSWICK and a trade secret of great commercial value, not known to RIEGEL or others, until BRUNSWICK disclosed it to RIEGEL in the course of a confidential relationship as set forth below. The Blending Process had great value as a potentially patentable invention.

7. RIEGEL is and has been engaged in the manufacture and sale of fabrics woven from yarns produced from natural and synthetic fibers, and since 1969 has also manufactured fabric woven from yarns in which metallic fibers are combined with natural and/or synthetic fibers using the BRUNSWICK Blending Process.

8. BRUNSWICK, in the summer of 1968, contacted RIEGEL with respect to any interest that RIEGEL might have in producing antistatic fabrics from yarns made by the use of the BRUNSWICK Blending Process. BRUNSWICK and RIEGEL subsequently entered into an agreement and confidential relationship whereby BRUNSWICK agreed to fully disclose and teach RIEGEL the technology relating to BRUNSWICK's Blending Process to enable RIEGEL to use that process in the manufacture of antistatic yarn for antistatic fabric. BRUNSWICK retained all of its rights to its Blending Process, with the understanding that RIEGEL would use BRUNSWICK metal fibers and not disclose the process to others. BRUNSWICK also agreed not to disclose or teach the process to any other textile company for a period of one year after RIEGEL had mastered the BRUNSWICK Blending Process and had product ready for the market place, so as to give RIEGEL a period of exclusive "lead time" over other potential producers of antistatic fabric who could use the BRUNSWICK Blending Process.

9. Beginning in July, 1968, BRUNSWICK employees instructed RIEGEL employees on the technology and use of the BRUNSWICK Blending Process at BRUNSWICK facilities and also at RIEGEL facilities.

10. By the end of August, 1969, RIEGEL employees had efficiently mastered the BRUNSWICK Blending Process to make product suitable for the market place, so that RIEGEL's one-year "lead time" was due to expire in August, 1970.

11. In October, 1969, RIEGEL requested underwriting certification from Factory Mutual Research Corporation of antistatic fabric made from yarns blended by the Brunswick Blending Process in preparation for the commencement of marketing.

12. By November, 1969 RIEGEL realized the value of the BRUNSWICK Blending Process and decided that it should

attempt to obtain and maintain a monopoly position in the manufacture and sale of antistatic yarn and light and medium weight antistatic fabric used for operating room garments and similar apparel.

13. In or about November 1969 senior management from BRUNSWICK and RIEGEL met in RIEGEL's New York offices to discuss RIEGEL's request for additional exclusive "lead time." At that time BRUNSWICK refused to extend the "period of RIEGEL's exclusivity" beyond August, 1970. BRUNSWICK refused the requested extension because BRUNSWICK wanted to expand the market for BRUNSWICK metal fibers to other textile manufacturers who would be able to manufacture and sell antistatic fabrics in competition with RIEGEL and develop additional products from fabrics produced from yarn made with the BRUNSWICK Blending Process. The expanded use of the Brunswick Blending Process would also be a source of royalty income, if BRUNSWICK elected to license the technology.

14. RIEGEL commenced actively marketing antistatic fabric in February, 1970 under the trademark "Riegelstat" and was urged by its patent attorneys to proceed with the filing of a patent application to obtain patents on the technology without informing BRUNSWICK.

15. BRUNSWICK decided to seek patent protection for its technology. On April 20, 1970, William G. Klein, a BRUNSWICK employee who originally conceived and developed the BRUNSWICK Blending Process, filed a patent application on behalf of BRUNSWICK which included among its claims a group of claims relating to that process. These claims were split off in a divisional application for separate prosecution in the United States Patent Office under 35 U.S.C. § 121. The remaining claims, other than the Blending Process claims in the divisional application, were included in United States Patent No. 3,678,675 which subsequently issued on July 25, 1972.

16. On August 14, 1970, when the exclusive "lead time" that had been granted by BRUNSWICK was about to expire, two RIEGEL employees, Reid C. Goodbar and Arthur Mitchell Pressley, at the instigation of RIEGEL, falsely and fraudulently filed in the United States Patent Office a patent application claiming that they had originated and invented the process for blending metal fibers with natural and synthetic fibers which BRUNSWICK had disclosed to RIEGEL. This fraudulent patent application was filed in an effort to illegally continue RIEGEL's exclusive position in the manufacture of antistatic yarns and fabrics which would be extended for the life of any patent that was obtained. RIEGEL and the purported inventors at all times knew that the claim of inventorship in that patent application was false and fraudulent since the application encompassed techniques and products revealed to RIEGEL by BRUNSWICK in the course of the confidential relationship established in 1968.

17. As a result of that fraudulent application, on November 21, 1972 a patent claiming the technology of the BRUNSWICK Blending Process was issued to the purported RIEGEL inventors by the United States Patent Office, said patent being entitled "Antistatic Yarn Production" and attached hereto as Exhibit A. Apparently the earlier filed, and still pending, patent claims of Brunswick relating to the Blending Process were not considered at that time. The patent improvidently issued to RIEGEL had the effect of destroying the trade secret status of the BRUNSWICK Blending Process. The patent rights to the Blending Process acquired by RIEGEL, as a result of its fraud, were, and are, the property of BRUNSWICK.

18. On March 6, 1975, the United States Patent Office, pursuant to 35 U.S.C. § 135 declared a patent interference (Interference No. 98,935) proceeding to determine the priority of invention between William G. Klein, who had originally conceived and developed the BRUNSWICK Blending Process, and Goodbar and Pressley, the purported inventors of RIE-

GEL's already issued "Antistatic Yarn Production" Patent (Exhibit A). Originally this interference involved all nine claims contained in Exhibit A which were added to Klein's divisional application referred to in paragraph 15 above. However, the Patent Office, at RIEGEL's urging, dissolved the interference as to claims which correspond to Claims 3, 8 and 9 of Exhibit A on the ground that the specification, description and drawings in the Klein application were not sufficient to support claims relating to the machinery or apparatus used in the Blending Process. Under the Patent Office procedure, BRUNSWICK was not permitted to submit additional specifications, descriptions or drawings to support its prior inventorship of the dissolved interference claims.

19. The three claims as to which that interference was dissolved, like all of the technology disclosed in the RIEGEL patent, were derived from technology and apparatus disclosed to RIEGEL by BRUNSWICK in the course of the confidential relationship.

20. RIEGEL persists in continuing to contest BRUNSWICK's claim of prior inventorship in the interference proceeding which still is pending with respect to the other six claims. Riegel continues to assert that it has a lawful patent monopoly of the technology covered by all nine claims of Exhibit A although it knows that the patent was improperly issued as a result of the fraudulent misrepresentations of inventorship.

21. On July 31, 1972 Goodbar and Pressley, at the instigation of RIEGEL, falsely and fraudulently filed an additional divisional patent application which contained claims of invention which, if allowed, would give RIEGEL a patent covering virtually all antistatic yarn and antistatic fabric end products. The patent on these broad claims did in fact issue on August 13, 1974 as United States Patent No. 3,828,543 and attached hereto as Exhibit B. However, on February 13, 1976, a similar patent interference (Interference No. 99,227) proceeding was declared as to all of the claims in Exhibit B. In the

course of that interference proceeding, prior art references came to the attention of the United States Patent Office which rendered all claims of invention of the end products unpatentable, and based on these prior art references, on January 12, 1977, the United States Patent Office dissolved that interference proceeding holding that the claims corresponding to all of the claims in Exhibit B were unpatentable.

22. Although the United States Patent Office has, in effect, ruled that the claims of Exhibit B were improperly allowed, RIEGEL continues to hold itself out to the world as the owner of the broad patent rights encompassed in those claims. RIEGEL has not disclaimed or abandoned its rights or dedicated the patent to the public but maintains the public posture of holding a lawful patent monopoly although the claims are not patentable. The United States Patent Office has no authority to withdraw or cancel the patent that was issued to RIEGEL.

23. Although BRUNSWICK initially believed that RIEGEL's patents conceivably might be based on some earlier invention that RIEGEL may have independently developed or acquired, BRUNSWICK, through its attorneys, advised RIGEL's attorneys in February, 1973 that any claim of invention by RIEGEL might be incorrect in view of BRUNSWICK's prior disclosure of the BRUNSWICK Blending Process to RIEGEL. REIGEL's attorneys assured BRUNSWICK's attorneys at that time that RIEGEL had a valid patent.

24. Not until October, 1977 did BRUNSWICK, in the course of the Patent Office Interference proceedings, become aware that RIEGEL's patent and RIEGEL's defense in the interference proceedings were not merely the result of an erroneous good faith claim of independent development, but that RIEGEL had willfully and tortiously engaged in a scheme to misappropriate to itself BRUNSWICK's Blending Process by fraudulently applying for a patent and continuing the fraud by its conduct in the interference proceeding. BRUNSWICK

learned at this time that RIEGEL, and its attorneys, at all times relevant hereto knew or should have known that RIEGEL had not in fact developed any new advancement of technology in the Blending Process, other than that which BRUNSWICK had disclosed to RIEGEL in the course of the confidential relationship; and that the purported inventors had made no contribution toward the invention of the blending process which RIEGEL claimed in its patent application, but merely had pirated and copied that which had been disclosed to RIEGEL by BRUNSWICK in the course of the confidential relationship. BRUNSWICK had no reasonable means of learning of RIEGEL's fraudulent and willful misconduct until the following incidents occurred in the course of the prosecution of now pending Patent Interference No. 98,935 which relates to RIEGEL's "Antistatic Yarn Production" Patent (Exhibit A):

(a) In or about October, 1977 BRUNSWICK was informed that RIEGEL obtained all of its information concerning the blending of antistatic yarn from BRUNSWICK in 1968, and that RIEGEL knew and always had known that the purported inventors of the RIEGEL "Antistatic Yarn Production" Patent (Exhibit A) made no independent invention.

(b) In October, 1977 BRUNSWICK was also informed that in November, 1969, after BRUNSWICK had taught RIEGEL the Blending Process, top level management officials at RIEGEL instructed other members of RIEGEL management and staff to do whatever they could to obtain a patent on BRUNSWICK's Blending Process in order to exclude RIEGEL's competitors in the manufacture of antistatic fabric.

(c) In August, 1981, BRUNSWICK was informed that everything that the plant foreman of RIEGEL, who was in charge of blending metal fibers and textile fibers from 1968-74, knew about the manufacture of antistatic fibers had been taught to him by BRUNSWICK personnel, and that no engineers or technicians from RIEGEL had ever suggested or implemented any modification in the BRUNSWICK Blending Process.

(d) In September, 1981, BRUNSWICK learned that, although RIEGEL's employee Goodbar had represented to the Patent Office in Patent Interference No. 99,277 that the purported invention of the antistatic yarn and blending process at RIEGEL was not made until January of 1970, Goodbar already had antistatic fabric in his possession in July of 1969, obviously made from yarn using the BRUNSWICK Blending Process.

25. RIEGEL's actions in falsely and fraudulently obtaining a patent on BRUNSWICK's Blending Process in breach of its obligations under the confidential relationship, and RIEGEL's continuing false and fraudulent claims of priority of invention in the patent intereference proceeding have directly and proximately injured BRUNSWICK and maliciously interfered with its prospective economic advantage by depriving BRUNSWICK of the value of its own invention, causing it to lose sales of metal fibers to other textile manufacturers, and forcing BRUNSWICK to expend large sums in the interference proceedings in an effort to have RIEGEL's fraudulently obtained patents made ineffective.

WHEREFORE, BRUNSWICK has been damaged and requests equitable and legal relief as set forth below as well as such other relief which justice may require:

(a) Lost profits, in an amount to be determined, on sales of metal fibers that BRUNSWICK would have made if potential customers had not believed that RIEGEL had the exclusive right to the Blending Process under its fraudulently procured patent.

(b) An accounting of all profits, including royalties, received by RIEGEL as a result of the patent which RIEGEL fradulently obtained in violation of BRUNSWICK's rights and all profits of RIEGEL resulting from the use of the BRUNSWICK Blending Process after the commencement of the interference proceeding which RIEGEL wrongfully contested and continues to contest;

(c) An order compelling RIEGEL to assign or transfer to BRUNSWICK all rights under its Antistatic Yarn

Production Patent, United States Patent 3,703,073 and any equivalent foreign patents that may have issued or for which applications have been filed;

(d) An order compelling RIEGEL to disclaim or dedicate to the public all rights under its Antistatic Yarn Patent, United States Patent 3,828,543 and any equivalent foreign patents that may have issued or for which applications have been filed;

(e) All expenses, costs and legal fees disbursed by BRUNSWICK as a result of RIEGEL's fraudulent claims of priority of invention in the patent interference proceedings which presently exceed $330,000;

(f) BRUNSWICK's expenses, costs and legal fees in this law suit; and

(g) Punitive damages in the amount of $500,000 as a consequnce of RIEGEL's egregious misconduct.

COUNT II

26-50. BRUNSWICK restates and realleges Paragraphs 1 through 24 as Paragraphs 26 through 50 of this Count II.

51. RIEGEL's knowingly false and fraudulent claims of priority of invention of the BRUNSWICK Blending Process in its patent application and its additional submissions in the Patent Office interference proceedings were made for the purpose of depriving BRUNSWICK of the value of its invention and preserving RIEGEL's fraudulently obtained patent.

52. RIEGEL's knowingly false and fraudulent misrepresentations to the Patent Office in connection with its patent application and continuance of the interference proceedings constitute an abuse of process.

53. BRUNSWICK restates and realleges Paragraph 25 of Count I as Paragraph 53 of this Count II.

WHEREFORE, BRUNSWICK has been damaged and requests equitable and legal relief as set forth below as well as such other relief which justice may require:

(a) Lost profits, in an amount to be determined, on sales of metal fibers that BRUNSWICK would have made if potential customers had not believed that RIEGEL had the exclusive right to the Blending Process under its fraudulently procured patent.

(b) An accounting of all profits, including royalties, received by RIEGEL as a result of the patent which RIEGEL fraudulently obtained in violation of BRUNSWICK's rights and all profits of RIEGEL resulting from the use of the BRUNSWICK Blending Process after the commencement of the interference proceeding which RIEGEL wrongfully contested and continues to contest.

(c) An order compelling RIEGEL to assign or transfer to BRUNSWICK all rights under its Antistatic Yarn Production Patent, United States Patent 3,703,073 and any equivalent foreign patents that may have issued or for which applications have been filed.

(d) An order compelling RIEGEL to disclaim or dedicate to the public all rights under its Antistatic Yarn Patent, United States Patent, 3,828,543 and any equivalent foreign patents that may have issued or for which applications have been filed;

(e) All expenses, costs and legal fees disbursed by BRUNSWICK as a result of RIEGEL's fraudulent claims of priority of invention in the patent interference proceedings which presently exceed $330,000;

(f) BRUNSWICK's expenses, costs and legal fees in this lawsuit; and

(g) Punitive damages in the amount of $500,000 as a consequence of RIEGEL's egregious misconduct.

COUNT III

54-78. BRUNSWICK realleges and restates Paragraphs 1 through 24 as Paragraphs 54 through 78 of this Count III which

charges a combination and conspiracy in violation of Section 1 of the Sherman Act, 15, U.S.C. § 1.

79. The materials used in the manufacture of antistatic yarns, including metal fibers, are sold and transported in interstate commerce. The antistatic fabrics which RIEGEL produces manufactured with yarn using the BRUNSWICK Blending Process is sold in interstate commerce to producers of operating room apparel and sheeting. Patent applications and other documents for submission to the United States Patent Office and foreign patent offices, license contracts, royalty payments and reports move across state lines and are a part of interstate trade and commerce.

80. The patents were fraudulently and wrongfully obtained by RIEGEL pursuant to a conspiracy to restrain trade in violation of Section 1 of the Sherman Act, the object of which was to prevent BRUNSWICK from licensing rights to the BRUNSWICK Blending Process to others, to prevent any manufacturer of antistatic yarn or fabric, other than RIEGEL, from using the BRUNSWICK Blending Process and to prevent such manufacturers from producing light-weight and medium-weight antistatic woven fabric suitable for operating room apparel and sheeting in competition with RIEGEL.

81. The purported inventors of RIEGEL's patents and the persons who pressed the fraudulent claims on behalf of RIEGEL before the United States Patent Office participated with RIEGEL in that combination and conspiracy which is continuing during the pendency of the interference proceeding. Other co-conspirators, not presently known to plaintiff, may have participated in this conspiracy. The conduct of RIEGEL and its co-conspirators was performed with specific anticompetitive purpose and intent.

82. As a result of its fraudulently obtained patent position, the retention and maintenance of its invalid patents, and other unlawful activities, RIEGEL on information and belief, has

been and is the only manufacturer of light and medium weight antistatic woven fabrics suitable for operating room apparel and sheeting.

83. The fraudulent representations as to inventorship made by and on behalf of RIEGEL constitutes a fraud on the United States Patent Office. The monopoly position of RIEGEL, resulting from invalid and fraudulently obtained patents, is an unlawful monopoly in violation of the antitrust laws.

84. The effect of the unlawful acts and unlawful monopolization by RIEGEL has been to deprive BRUNSWICK of a market for its metal fibers. Potential competitors of RIEGEL in antistatic yarn and fabric have been discouraged by the patent position which RIEGEL obtained by its fraud and, on information and belief, there are no producers of antistatic yarns or woven fabrics competing with "Riegelstat." BRUNSWICK has also been deprived of the opportunity to generate royalty income from licensing the right use the BRUNSWICK Blending Process to RIEGEL and others.

WHEREFORE, BRUNSWICK has been damaged and requests equity and legal relief as set forth below as well as such other relief as justice may require:

(a) Damages for the wrongful appropriation and use of BRUNSWICK's Blending Process by RIEGEL calculated on the basis of a reasonable royalty of at least 5% of the selling price of RIEGEL products manufactured since March 6, 1975 using that process which are to be trebled under the provisions of Section 4 of the Clayton Act, 15 U.S.C. § 15;

(b) Additional damages in an amount to be determined for profits BRUNSWICK would have made on sales of metal fibers if potential customers had not believed that RIEGEL had the exclusive right to the Blending Process under its fraudulently procured patent, the total of which is to be trebled under the provisions of Section 4 of the Clayton Act, 15 U.S.C. § 15;

(c) Additional damages in an amount to be finally determined, but which presently exceeds $333,000, for expenses, costs and legal fees disbursed by BRUNSWICK as a result of RIEGEL's fraudulent claims of priority of invention in the patent interference proceeding, which, after trebling under the provisions of Section 4 of the Clayton Act, 15 U.S.C. § 15; will exceed $1,000,000;

(d) An order compelling RIEGEL to assign or transfer to BRUNSWICK all rights under its Antistatic Yarn Production Patent, United States Patent 3,703,073 and any equivalent foreign patents that may have issued or for which applications have been filed;

(e) An order compelling RIEGEL to disclaim or dedicate to the public all rights under its Antistatic Yarn Patent, United States Patent 3,828,543 and any equivalent foreign patents that may have issued or for which applications have been filed; and

(f) BRUNSWICK's expenses and costs of suit including reasonable attorneys' fees under Section 4 of the Clayton Act, 15 U.S.C. § 15.

COUNT IV

85-115. BRUNSWICK realleges and restates Paragraphs 1 through 24, 51 and 79 through 83 as Paragraphs 85 through 115 of this Count IV which charges a conspiracy to monopolize and attempt to monopolize and unlawful monopolization in violation of Section 2 of the Sherman Act, 15 U.S.C. § 2.

116. The acts alleged were intended to create and did create a monopoly for RIEGEL by preventing any other manufacturer of antistatic yarn or fabric from using the BRUNSWICK Blending Process and preventing others from producing light-weight and medium-weight antistatic woven fabrics suitable for operating room apparel and sheeting in competition with RIEGEL. The unlawful patent monopoly obtained by RIEGEL also prevented BRUNSWICK from licensing the BRUNSWICK Blending Process to RIEGEL and others.

117. The effect of this unlawful attempt to monopolize and unlawful monopolization by RIEGEL has been to deprive BRUNSWICK of a market for its metal fibers since, on information and belief, there is no other producer of antistatic yarn or fabric which competes with "Riegelstat." BRUNSWICK has also been deprived of the opportunity to generate royalty income from licensing the right to use the BRUNSWICK Blending Process to RIEGEL and other manufacturers of antistatic yarn.

WHEREFORE, BRUNSWICK has been damaged and requests equity and legal relief as set forth below as well as such other relief as justice may require:

(a) Damages for the wrongful appropriation and use of BRUNSWICK's Blending Process by RIEGEL calculated on the basis of a reasonable royalty of at least 5% of the selling price of RIEGEL products manufactured since March 6, 1975 using that process which are to be trebled under the provisions of Section 4 of the Clayton Act, 15 U.S.C. § 15.

(b) Additional damages in an amount to be determined for profits BRUNSWICK would have made on sales of metal fibers if potential customers had not believed that RIEGEL had the exclusive right to the Blending Process under its fraudulently procured patent, the amount of which is to be trebled under the provisions of Section 4 of the Clayton Act, 15 U.S.C. § 15;

(c) Additional damages in an amount to be finally determined, but which presently exceeds $333,000, for expenses, costs and legal fees disbursed by BRUNSWICK as a result of RIEGEL's fraudulent claims of priority of invention in the patent interference proceeding, which, after trebling under provisions of Section 4 of the Clayton Act, 15 U.S.C. § 15, will exceed $1,000,000;

(d) An order compelling RIEGEL to assign or transfer to BRUNSWICK all rights under its Antistatic Yarn Production Patent, United States Patent 3,703,073 and any equivalent foreign patents that may have issued or for which applications have been filed;

(e) An order compelling RIEGEL to disclaim or dedicate to the public all rights under its Antistatic Yarn Patent, United States Patent 3,828,543 and any equivalent foreign patents that may have issued or for which applications have been filed; and

(f) BRUNSWICK's expenses and costs of suit including reasonable attorneys' fees under Section 4 of the Clayton Act, 15 U.S.C. § 15.

COUNT V

118-145. BRUNSWICK realleges and restates Paragraphs 1 through 24, 79, 82 and 116 as Paragraphs 118 through 145 of this Count V which charges that RIEGEL's unlawful acquisition of the BRUNSWICK Blending Process constitutes an acquisition of assets in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18.

146. The Blending Process technology was a valuable asset of BRUNSWICK and a patent application relating to that technology had been filed on behalf of BRUNSWICK on April 20, 1970.

147. RIEGEL and BRUNSWICK are corporations subject to the jurisdiction of the Federal Trade Commission and are engaged in interstate commerce.

148. RIEGEL acquired patent rights on the Blending Process belonging to BRUNSWICK as a result of RIEGEL's fraud and misrepresentation in the United States Patent Office.

149. The effect of the unlawful acquisition by RIEGEL has been to deprive BRUNSWICK of a market for its metal fibers. Potential competitors of RIEGEL in antistatic yarn and fabric have been discouraged and, on information and belief, there are no producers of antistatic yarns or woven fabrics competing with "Riegelstat." BRUNSWICK has also been deprived of the opportunity to generate royalty income from licensing the right to use the BRUNSWICK Blending Process to RIEGEL and others.

WHEREFORE, BRUNSWICK has been damaged and requests equity and legal relief as set forth below as well as such other relief as justice may require;

(a) Damages for the wrongful appropriation and use of BRUNSWICK's Blending Process by RIEGEL calculated on the basis of a reasonable royalty of at least 5% of the selling price of RIEGEL products manufactured since March 6, 1975 using that process which are to be trebled under the provisions of Section 4 of the Clayton Act, 15 U.S.C. § 15;

(b) Additional damages in an amount to be determined for profits BRUNSWICK would have made on sales of metal fibers if potential customers had not believed that RIEGEL had the exclusive right to the Blending Process under its fraudulently procured patent, the amount of which is to be trebled under the provisions of Section 4 of the Clayton Act, 15 U.S.C. § 15;

(c) Additional damages in an amount to be finally determined, but which presently exceeds $333,000, for expenses, costs and legal fees disbursed by BRUNSWICK as a result of RIEGEL's fraudulent claims of priority of invention in the patent interference proceeding, which, after trebling under the provisions of Section 4 of the Clayton Act, 15 U.S.C. § 15, will exceed $1,000,000;

(d) An order compelling RIEGEL to assign or transfer to BRUNSWICK all rights under its Antistatic Yarn Production Patent, United States Patent 3,703,073 and any equivalent foreign patents that may have issued or for which applications have been filed;

(e) An order compelling RIEGEL to disclaim or dedicate to the public all rights under its Antistatic Yarn Patent, United States Patent 3,828,543 and any equivalent foreign patents that may have issued or for which applications have been filed; and

(f) BRUNSWICK's expenses and costs of suit including reasonable attorneys' fees under Section 4 of the Clayton Act, 15 U.S.C § 15.

COUNT VI

150-155. BRUNSWICK restates and realleges Paragraphs 1 through 5 as Paragraphs 150 through 155 of this Count VI.

156. BRUNSWICK restates and realleges Paragraph 7 as Paragraph 156 of this Count VI.

157. On or about October 27, 1980, RIEGEL submitted to BRUNSWICK a written purchase order (which purchase order is appended to and made a part of this Complaint as Exhibit C, and is referred to herein as "the Purchase Order") by which RIEGEL offered to purchase from BRUNSWICK, at a specified price, 7500 pounds of 8 micron, 15 grain per yard stainless steel BRUNSMET trademarked metal fiber.

158. Pursuant to an established course of dealing between BRUNSWICK and RIEGEL, RIEGEL was to notify BRUNSWICK weekly or bi-weekly by telephone of RIEGEL's requirements under the Purchase Order for the following week.

159. BRUNSWICK accepted the Purchase Order by performing thereunder in conformity with the Purchase Order and course of dealing hereinabove described. RIEGEL accepted BRUNSWICK's performance and made payments on account of the Purchase Order until August, 1981.

160. In reliance upon the Purchase Order, BRUNSWICK specially manufactured 8 micron, 15 grain per yard stainless steel BRUNSMET trademarked fiber for RIEGEL only; BRUNSWICK had no other customers for this type of fiber.

161. In August of 1981, after delivery by BRUNSWICK of RIEGEL's mid-August requirements under the Purchase Order, RIEGEL, by its agent, advised BRUNSWICK to hold further shipments, and thereupon ceased notifying BRUNSWICK of its requirements pursuant to the Purchase Order and the course of dealing hereinabove described.

162. Despite numberous inquiries by BRUNSWICK, RIEGEL made no further notifications under the Purchase Order, and, on or about February 11, 1982, advised BRUNSWICK that RIEGEL was repudiating the Purchase Order.

163. As a direct and proximate result of RIEGEL's repudiation of the Purchase Order, BRUNSWICK has been damaged by its investment in specialized and unsaleable raw materials and finished product, the carrying costs thereof, and lost profits in a total amount in excess of $139,000.

WHEREFORE, BRUNSWICK has been damaged and requests relief as set forth below as well as such other relief as justice may require:

(a) Damages in an amount to be determined for BRUNSWICK's investment in specialized and unsaleable raw materials and finished product, and the carrying costs thereof resulting from RIEGEL's breach and repudiation of the Purchase Order;

(b) Additional damages in an amount to be determined for profits BRUNSWICK would have earned on sales under the Purchase Orders had RIEGEL performed thereunder;

(c) Interest on the said damages at the legal rate; and

(d) BRUNSWICK's expenses and costs of suit including reasonable attorneys' fees.

BRUNSWICK CORPORATION

By /s/ E. C. HEININGER
One of Its Attorneys

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JURY DEMAND

Please take notice that plaintiff demands trial by jury in this action.

/s/ E. C. HEININGER
One of the Attorneys
for Brunswick Corporation

Erwin C. Heininger
MAYER, BROWN & PLATT
231 South LaSalle Street
Chicago, Illinois 60604
(312) 782-0600

February 16, 1970

CONFIDENTIAL

To: Mr. G. T. Gardner

FROM: R. R. Varin

Re: Riegelstat Patent Situation

In spite of M. Houston's recent comments du Pont will not be able to assist us in obtaining patent protection for Riegelstat. This is the position taken by the du Pont Patent Division and related to me by Les Moler. In the long run this is probably just as well since it might be difficult to make a clean distinction between the interests of du Pont and those of Riegel's in pursuing a patent application.

I have, therefore, initiated aggressive patent action on our own. I met February 13 with David Toomey of Pennie, Edmonds and briefed him on Riegelstat. His opinion, contrary to Parrott's original views, is that there is a good chance that we can obtain protection. He will immediately start a search of prior art and patentability and we will feed him information he needs to draft an application.

Data obtained by X-ray radiography, electrostatic charging and dissipation and conductivity methods will be important in describing our product and in setting the limits of effectiveness.

Toomey advised us to proceed on our own in filing a patent application, i.e., without getting Brunswick involved. I concur.

Exhibit 3
(continued)

We will be in a much better negotiating position after we have an application on file. Therefore, I would urge everybody not to discuss patent matters with Brunswick and du Pont during this stage.

RRV: cb

cc: R. E. Coleman
R. C. Goodbar
J. A. Hafner
G. E. Mewborne
R. C. McDunn
W. R. Reid
D. J. Stevens

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UNITED STATES DISTRICT COURT

For the Northern District of Illinois

Eastern Division

BRUNSWICK CORPORATION,
a Delaware corporation,

Plaintiff,

v.

RIEGEL TEXTILE
CORPORATION, a Delaware corporation,

Defendant.

No. 82 C 4374
Judge Aspen

STATE OF TEXAS
COUNTY OF DALLAS } ss.:

AFFIDAVIT OF JOHN G. HEIMOVICS

John G. Heimovics, being first duly sworn on oath, states that this Affidavit is filed in opposition to the Motion to Dismiss the complaint of Riegel Textile Corporation (hereinafter "Riegel") and that I have personal knowledge of the matters stated in this affidavit and if sworn as a witness could competently testify thereto. Affiant further states:

1. I have been employed as a patent attorney by Brunswick Corporation (hereafter "Brunswick") during the events reflected herein, and have continuously been co-counsel for the assignee Brunswick, the senior party in the pending Interference Proceeding No. 98,935 declared March 6, 1975, which is referred to in paragraph 18 of the complaint.

2. In January of 1973, after the Riegel process patent issued, I informed D. J. Toomey of Pennie & Edmonds,

Riegel's patent counsel, that a Brunswick employee had applied for a similar patent and suggested that any claim of invention on behalf of Riegel and its employees Goodbar and Pressley might be incorrect since Brunswick had taught Riegel a blending process prior to the application date of Riegel's patent. (¶¶ 9 and 23 of the complaint) I supplied to Mr. Toomey a copy of a Brunswick Laboratory entry of E. H. Zimmerman (Exhibit 5 attached) which showed that the process had been developed at Brunswick prior to July 19, 1968. Riegel's patent counsel stated he would check into the matter and a short time later assured me that Riegel had a valid patent. (¶ 23 of the complaint) At that time I had no reason not to believe him.

3. On July 24, 1973, after the Patent Office discovered that Brunswick had filed a patent application on its process on April 20, 1970, it referred to Riegel's issued patent and stated as follows:

> "The patent to Goodbar et al is cited herein as claiming substantially the same subject matter as the instant application. Applicant is therefore required to copy claim 1 of this patent as well as any other claims of the patent which he believes finds support in this application for purposes of interference." (See Exhibit 6 attached)

On November 19, 1973, I responded to the Patent Office action by adding claims to Brunswick's pending application copied from Riegel's issued patent, pursuant to 37 C.F.R. ¶ 1.205, after which the Patent Office declared the Interference.

4. In or about October, 1977, in the course of taking Riegel's testimony-in-chief in the Interference Proceeding, I developed initial suspicions that defendant Riegel may have stolen Brunswick's blending process based on informal statements of David A. Lyttle, a former employee of Riegel. However, I was unable to obtain any corroborating admissible

evidence to support that suspicion during cross-examination (during Riegel's testimony period) of persons who were involved in the marketing and manufacturing of Riegel's antistatic fabric or the development of its alleged invention. Therefore, on or about July 14, 1978, the issue of the suspected theft of Brunswick's invention by Riegel was first raised in the Interference Proceeding in order to obtain discovery on this issue.

5. On August 25 and 26, 1980, my suspicions of theft were first confirmed by the testimony of Charles F. Hedlund, chief electrical engineer of Factory Mutual Research Corporation, a testing laboratory for underwriters' certification. His testimony is attached as Exhibit 7 ; however, for the convenience of the Court, the highlights of this testimony is attached as Exhibit 8 , a portion of the brief filed by Brunswick in the Interference Proceeding on December 2, 1982. In essence, Mr. Hedlund testified that the only antistatic fabric Factory Mutual ever tested was submitted by Riegel in the fall of 1969, that it was tested and was approved about December 10, 1969, more than a month before January 24, 1970, the earliest date on which defendant purports to have invented its claimed blending process, antistatic yarn and antstatic fabric. No other fabric was ever submitted by Riegel to Factory Mutual for test, but Riegel had continued to sell its "Riegelstat" antistatic fabric as having been approved by Factory Mutual. New tests would have been required by Factory Mutual if the product or manufacturing process had changed. Since there were no additional tests, the fabric Riegel continued to sell had to be the same type of fabric tested by Factory Mutual in 1969, and had to have been manufactured using the Brunswick blending process that Riegel had used to make the material in 1969. It could not have been invented at Riegel in January of 1970.

6. David A. Lyttle, on September 4, 1981, testified in the Interference that following a meeting of officials of plaintiff and defendant in November, 1969, (see Exhibit 9 , Klein Exhibit 285), in which plaintiff refused to give defendant all the exclusive lead time over competitors that defendant desired, the officials of defendant decided to explore patent possibilities as a means of preventing its competitors from entering into antistatic programs using the Brunswick process. Attached as Exhibit 10 are copies of pp. 946-950 of Mr. Lyttle's testimony referring to the two meetings.

7. Final corroboration of the suspected theft of Brunswick's process by Riegel was provided on October 3, 1981, when John W. Turner, the former plant forman of Riegel responsible for their blending operating, testified in the Interference that only the Brunswick blending process was used by Riegel from the summer of 1968 until he left its employment in March or April, 1973 and was the one taught to Riegel by Brunswick, which had never been modified or changed. (See Turner deposition, attached as Exhibit 11, particularly pp. 1875-1878).

Further, Affiant sayeth not.

/s/ JOHN G. HEIMOVICS

John G. Heimovics

Subscribed and Sworn to
before me this 29th day
of July, 1983.

[Jurat and Seal]

Notary Public

My Commission Expires 2/2/85

AGREEMENT

THIS AGREEMENT, made effective this day of , 1973, by and between Riegel Textile Corporation (hereinafter called "RIEGEL"), a Delaware Corporation having a place of business at 260 Madison Avenue, New York, New York, and Southern Mills, Inc. (hereinafter called "SOUTHERN"), a Corporation having a place of business at 585 Wells Street, Atlanta, Georgia 30312.

WITNESSETH

WHEREAS, RIEGEL as a result of research and development possesses certain technology relating to the production of textile fiber yarns having short staple lengths of metal interspersed uniformly therein for use in fabrics to produce a neutralization of static electrical charges, and

WHEREAS, SOUTHERN has commercially operable facilities for the production of such textile fiber yarns blended with Nomex; and

WHEREAS, SOUTHERN is desirous of producing textile fiber yarns blended with Nomex incorporating such technology of RIEGEL, and RIEGEL is desirous of purchasing quantities of textile fiber yarns produced according to such technology and the parties hereto have agreed by separate agreement to purchase an initial quantity of such yarns.

NOW, THEREFORE, in consideration of the undertakings herein set forth, the parties have agreed and do hereby agree as follows:

Section 1-Definitions

(a) The term "Riegelstat Technology" shall mean collectively the know-how possessed or developed by RIEGEL

relating to processes, machines, compositions, formulae and operations for the manufacture and construction of textile fiber yarns having short staple lengths of metal interspersed uniformly therein for use in fabrics to produce a neutralization of static electrical charges.

(b) The term "Patent Rights" shall mean collectively U. S. Patent No. 3,703,073, entitled ANTISTATIC YARN PRODUCTION and any and all additional or improvement patents or patent applications relating to Riegelstat Technology.

(c) The term "Confidential Information" shall mean the compilation or partial compilation of information relating to Riegelstat Technology except such information as has been or may become available to the public through no fault of SOUTHERN. For purposes of this definition, it is understood that any such compilation or partial compilation of information shall remain "Confidential Information", even though components or characteristics of such information are in the public domain as long as the way in which they are interrelated in such compilation is not in the public domain.

(d) The term "Employee Confidential Disclosure Agreement" shall mean an agreement in the form attached hereto as Schedule A to be provided by SOUTHERN to all SOUTHERN's employees who may become involved or connected in any manner with the production of Riegelstat under this Agreement and who will, as a result of said involvement, acquire information being part of RIEGEL's Riegelstat Technology.

Section 2-Responsibilities Regarding Manufacture and Sale

(a) SOUTHERN agrees to produce yarn in accordance with RIEGEL's specifications as to quality and to deliver the

above to RIEGEL at the time specified in RIEGEL's purchase orders.

(b) RIEGEL shall disclose to SOUTHERN Riegelstat Technology necessary for the production of textile fiber yarns.

(c) RIEGEL agrees to purchase and SOUTHERN agrees to manufacture and sell to RIEGEL all RIEGEL's requirements of textile fiber yarns made in accordance with Riegelstat Technology and blended of Nomex yarns for a period of five (5) years and for so long as such yarns produced by SOUTHERN meet RIEGEL's quality, quantity and price requirements. Should any bid or yarns fail to meet RIEGEL's requirements, RIEGEL shall give SOUTHERN a reasonable opportunity to comply with such requirements, failing which, RIEGEL may terminate the exclusive rights granted hereunder. In the event RIEGEL's requirements during any period exceed what SOUTHERN reasonably can be expected to supply based on its known capacity and RIEGEL's prior demands, SOUTHERN will be obligated only to supply a portion of RIEGEL's requirements without losing its exclusivity and RIEGEL may purchase the remainder from any third party of its choosing.

(d) SOUTHERN agrees that for a minimum of two (2) years after the effective date of this Agreement and for as long as the exclusive rights of Paragraph (c) remains in effect, (i) it shall not manufacture yarns made with or incorporating Riegelstat Technology or (ii) disclose Riegelstat Technology to anyone.

(e) Notwithstanding any termination of its obligations pursuant to Paragraph (d) above, SOUTHERN agrees that it shall not disclose Confidential Information to anyone for so long as it remains Confidential, as defined herein.

(f) SOUTHERN agrees that, as a condition of this Agreement, each employee of SOUTHERN being involved or connected with the production of Riegelstat yarn under this Agreement shall, as a condition for his employment in such capacity, execute an Employee Confidential Agreement in accordance with the terms of this Agreement, and SOUTHERN further agrees to enforce such agreements with respect to unauthorized disclosure by an employee of RIEGEL's Confidential Information provided, however, the expenses for such enforcement shall be borne by RIEGEL.

Section 3-Improvements

All improvements related to Riegelstat Technology developed by SOUTHERN and/or its employees and affiliates in connection with the performance under this Agreement shall be promptly disclosed to RIEGEL and should SOUTHERN obtain a patent on any such improvement, SOUTHERN shall grant a non-exclusive royalty-free license to RIEGEL thereunder; provided SOUTHERN shall not apply for patents thereon without RIEGEL's prior written approval if any such patent application must contain a disclosure of RIEGEL Confidential Information.

Section 4-Implied License

No license is granted or implied by RIEGEL to SOUTHERN under its Patent Rights except as is required to make and sell yarn to RIEGEL.

Section 5-Survival

The obligations of SOUTHERN to keep RIEGEL's Confidential Information in confidence as provided for herein shall survive any termination of this Agreement.

Section 6-Assignment

This Agreement may not be assigned by SOUTHERN without the written consent of RIEGEL.

Section 7-Entire Understanding

This Agreement constitutes the entire understanding between the parties with respect to the subject matter hereof.

No modification, extension or waiver of any provision hereof or any release of any right hereunder shall be valid, unless the same is in writing and is consented to by both parties.

Section 8-Governing Law

The provisions of this contract shall be governed by and interpreted in accordance with the laws of the State of New York.

IN WITNESS WHEREOF, the parties have executed this Agreement as of the day and year first above written.

RIEGEL TEXTILE CORPORATION

By /s/ D. J. STEVENS
Vice President

Attest:

/s/ RONALD BEAUFORD

SOUTHERN MILLS, INC.

By /s/ W. D. ELLIS JR.
Vice President

Attest:

/s/ PRENTICE H. TAYLOR

Final Hearing
August 19, 1983

MAILED
Nov.-4, 1983

Paper No. 257
JRB/wgb

BOARD OF PATENT INTERFERENCES
IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT INTERFERENCES

Patent Interference No. 98,935

Goodbar et al. v. Klein

Antistatic Yarn Production

Patent granted to Reid C. Goodbar and Arther Mitchell Pressley on August 13, 1974, Patent No. 3,828,543 filed July 31, 1972, Serial No. 276,890. Accorded benefit of Serial No. 63,755 filed August 14, 1970, now Patent No. 3,703,073 issued November 21, 1972.

Application of William G. Klein filed June 12, 1972, Serial No. 262,108. Accorded benefit of 29,822 filed April 20, 1970, now Patent No. 3,678,675 issued July 25, 1972.

Edmonds, Taylor, Adams, Young, Laist, Weild, Jr., Neill, Seagraves, Traver, Anderegg, Lawrence, Scheck, Metzger, McKay, Misrock, Mullenger, Brown, Kadel, Weild, III, Toomey, McKenney, Jones, Ranalli, Contanzaro, Kight and Fleming, Jr. for Goodbar et al. Oral argument by J.D. Fleming, Jr.

Olexa, Epstein, Heimovics, Lawler, Gordon, and Mason for Klein. Oral argument by Lloyd W. Mason

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Torchin, Weinberger and Boler, Examiners of Interferences.
Boler, Examiner of Interferences.

This interference involves a patent to Goodbar et al. (Goodbar) assigned to Riegel Textile Corporation (Riegel), and an application of Klein assigned to the Brunswick Corporation (Brunswick). The application that matured into the Goodbar patent was filed on August 14, 1970. Klein is the senior party due to the fact that he has been accorded the benefit of an application filed April 20, 1970.

The subject matter involved concerns a method of drawing and blending textile fiber and metal filaments. The relationship of the counts of the interference to the claims of the respective parties is:

Count	Goodbar	Klein
1	1	16
2	2	17
4	4	19
5	5	20
6	6	21
7	7	22

Counts 1, 4, 5 and 6 read as follows:

Count 1

The method of drawing and blending textile fiber and metal filaments while maintaining contact with each other comprising, feeding a least one bundle of fibers of textile material through draw rolls, simultaneously feeding a multifilament metal bundle through said draw rolls, guiding said metal bundle relative to said textile bundle to cause the latter continuously to cushion said metal bundle with respect to said draw rolls when passing therethrough while controlling the tension force on said metal filaments, to break limited numbers of said filaments generally continuously during the period of drawing.

Count 4

The method according to count 1 wherein said textile bundles and metal bundles have similar surface friction characteristics with respect to said draw rolls.

Count 5

The method according to count 4 wherein said textile bundle is cotton and said metal bundle is stainless steel.

Count 6

The method according to count 5 wherein said stainless steel is made of metal filaments in the 4 to 12 micron range.

Both parties submitted evidentiary records in an attempt to prove dates of invention prior to their respective filing dates, filed briefs and appeared for oral argument at final hearing.

Issues

The following issues will be dealt with in the order presented:

(1) Klein's right to make his claims corresponding to the counts. We hold that Klein does not have the right to make any of those claims.

(2) Klein's motion to strike the testimony of certain of Goodbar's witnesses. We deny the motion.

(3) Goodbar's case for priority. We hold that Goodbar has not proven either conception or a reduction to practice prior to Klein's effective filing date.

(4) Klein's case for priority. We hold that Klein has established a date of invention prior to his benefit date for the subject matter in counts 1, 2, 4 and 7.

(5) Goodbar's motion to strike the testimony of certain of Klein's witnesses. The motion is dismissed as being moot.

(6) Klein's allegation that Goodbar's patent was obtained fraudulently. This question is not reached because it was not timely raised by way of a motion under 37 CFR 1.231.

I

The Primary Examiner denied Goodbar's motion under 37 CFR 1.231 to dissolve on the ground that Klein had no right to make the claims in his application corresponding to counts 1, 2, and 4 through 7. The interference was dissolved by the Primary Examiner with respect to counts 3, 8 and 9 (Paper No. 19).

Goodbar contends that Klein does not have a written description of the invention as required by 35 USC 112, first paragraph. In Paper No. 11 entitled "MEMORANDUM IN SUPPORT OF THE PARTY GOODBAR ET AL.'S MOTION TO DISSOLVE", Goodbar made the following pertinent arguments:

> In the Goodbar et al. application, original claim 1 was rejected as being unpatentable under 35 USC 103 over U.S. Patent No. 2,132,524 to Booth in view of U.S. Patent No. 3,422,460 to Burke et al. Original claim 1 recited the following:
>
> 'A method of drawing and blending textile fiber and metal filaments comprising simultaneously drawing said fiber and breaking and drawing said filaments while maintaining contact each with the other, and controlling the tension force on said metal filaments to break limited numbers of said filaments generally continuously during the period of drawing.'
>
> Original claim 3, which was in dependent form recited essentially all of the recitations of count 1 and this claim was originally held to be allowable by the Examiner, but objected to as depending from rejected claims. This claim was ultimately cancelled and replaced by a claim identical to count 1 in independent form. For the purpose of comparing the recitations of the original Goodbar et al. claim 3, as opposed to original claim 1 as it was rejected by the Examiner, original claims 2 and 3 are repeated hereinbelow verbatim:
>
> '2. The method according to claim 1 wherein said fiber cushions said filaments in the control of tension forces.

3. The method according to claim 2 comprising feeding at least one sliver of a textile material through draw rolls, and simultaneously feeding a multifilament metal tow through said rolls while guiding said metal tow relative to said textile sliver to cause the latter continuously to cushion said metal tow with respect to said rolls when passing therethrough.'

Thus it is quite apparent that claim 3 was originally considered to be allowable by the Examiner because of the recitations relating to *feeding and guiding* the textile slivers and the metal filament tow in such a manner as to cause the *continuous cushioning* of the metal filaments which made the critical difference between just any blend of materials and a slub-free blend capable of being washed without loss of steel filaments. In particular, these features, combined with the tension control to break limited numbers of the filaments spelled success for the party Goodbar et al. (Pages 11 and 12, emphasis in original).

* * *

It is clear that the argument of inherency of guiding material into such machines as advanced in the party Klein's Amendment Under Rule 205 must fail and that by merely introducing the materials into a drafting apparatus as shown in Figs. 2 and 3 of the Klein application provides no assurance that they will remain in these relative positions. Something more is needed and those required additional elements are only to be found in the Goodbar et al. patent. The requirement in Count 1 for *guiding* of the filaments to cause *continuous* cushioning of the steel fibers by the textile fibers while controlling the tension force on the metal filaments to break limited numbers finds clear support in the Goodbar et al. patent, whereas no support whatsoever for such limitations are found in the Klein application. (Page 15, emphasis in original).

* * *

The party Goodbar et al. has thus conclusively demonstrated that the guiding to cause continuous cushioning while controlling the tension force on the metal filaments to break limited numbers comprise limitations in count 1 of the interference which are material and important limitations. (Page 16).

In his brief at final hearing, Goodbar contends that Klein does not disclose means for tensioning the steel tow between the steel spools and the first set of draw rolls (Main Brief, page 17). Klein contends that this issue was not raised by Goodbar in his motion to dissolve, and, therefore, Goodbar is not entitled to raise it at final hearing. Klein contends that the tension force referred to in the motion to dissolve is the force required to break the metal filaments which is applied to the filaments due to the fact that each subsequent set of rollers on the draw frame rotates faster than the preceding set to thereby stretch and break the metal filaments. We agree with Klein that the tension force referred to in claim 16 (count 1) is the tension between the sets of rollers and not the tension between the steel spools and the first draw roll as alleged by Goodbar. Moreover, the arguments of Goodbar quoted above from his motion to dissolve clearly indicate that he was then arguing that the tension force referred to in count 1 was that between the sets of rollers and not the force on the metal tow between the steel spools and the first set of draw rolls. To the extent that the tension force recited in the count could be properly interpreted to relate to the tension to the filaments leading up to the first set of draw rolls, Goodbar is not entitled to contend that this feature is not disclosed by Klein because he did not raise the question in his motion to dissolve. *Magdo* v. *Kooi*—F.2d-, 216 USPQ 1033 (Fed. Cir. 1983).

The burden is on Klein to show that he has clear support for every limitation in his claims corresponding to the counts and all doubts will be resolved against him. Since Klein's claims are identical to the counts, we refer to the counts for the most part, hereafter. Where the support must be based on an inherent disclosure, it is not sufficient that a person following the disclosure might obtain the result set forth in the counts; it must inevitably happen. *Dreyfus* v. *Sternau,* 357 F.2d 411 , 149 USPQ 63 (CCPA 1963); *Holmes* v. *Kelly,* 586 F.2d 234, 199 USPQ 778 (CCPA 1978).

On pages 98 through 100 of Klein's brief, he has quoted portions of the disclosure in his application which he relies upon as either an express or inherent description of the subject matter in count 1. We fail to find therein any description of *guiding* the metal bundle relative to the textile fibers to cause the latter *continuously to cushion the metal bundle.* Neither do we find therein a description of *controlling the tension on the metal filaments* to break *limited numbers* of the metal filaments *generally continuously* during the period of drawing. Klein's disclosure merely states with respect to Figure 2 that the organic sliver (textile fiber of the count) and the tow of conductive filaments are introduced at the backing rolls of a roller drafting machine or with respect to Figure 3 that the tow of conductive filaments is introduced in the roller drafting machine at the back rolls in between the organic slivers. Figures 2 and 3 of the Klein application illustrate an upper and a lower roller with the tow and sliver pressed there between. The tow is shown as being centered with respect to the sliver or slivers, but no significance is attributed to this relationship in the written description. No other set or sets of rollers are illustrated in the Klein drawings and nothing is said about controlling the tension on the filaments between sets of rollers to break limited numbers of filaments generally continuously as recited in count 1. Thus, we find no express support in the Klein disclosure for the limitations in question.

In our view, the evidence in the record clearly establishes that the claimed process will not inherently flow as a result of merely introducing sliver and tow into the back rollers of a roller drafting machine. At KR 26 Klein testified as follows:

> Q. In your textile experience, what types of guides have you seen for guiding textile bundles or textile slivers or tow material?

A. Well, the variety is almost infinite. Most of these things are sort of jerry-rigged on the job, although there are a number of standard elements such as pigtails and grooves, et cetera, or any combination of these things. Really, it is a matter of the ingenuity of the operator to guide his materials into an optimum condition. Very often what is done is just to fool around until it comes out best.

KX 73 and 74 are reports prepared in 1968 by Zimmermann, an employee of Klein's assignee, wherein he stated:

> . . . A guide will be affixed so that the steel remains on top of the cotton for better breaking into the staple and to reduce the possibility of clumping. This will not permit the steel to fall between the slivers, which we feel is partially the cause of the poor blending. (KX 73)
>
> * * *
>
> . . . At a second visit, a guide was utilized which led the 4 ends of 8/300/S tow directly on top of the sliver into the first pass of the draw frame, thus breaking the tow into staple and drafting it simultaneously, after which 8 ends of each of the first pass were put up on the second and third passes. This appeared to be quite an improvement over the previous method. . . .(KX 74)

Lanoue, also an employee of Klein's assignee, is a witness called by Klein to corroborate conception and a reduction to practice. He testified at KR 1668 with regard to the purported October 1969 reduction to practice:

> . . . I was guiding all of this with my hand, I didn't have any kind of a guide, and Bill had told me, "Remember, Paul, don't lose the sandwich." In other words, don't let the steel come to the outside, try to keep it as highly concentrated in the center of the two webs of nylon, top and bottom, which was what I was making darn sure I was doing. . . .

At KR 1674 and 1675, Lanoue further testified as follows:

Q Did you ever run this automatically?

A Yes, we went into production. . .

Q How did you keep things in that relative—how did you keep the nylon sliver and the metal filament tow in the relative positions that you have just shown under the rollers I and the guide that you required?

A Well, at first — let me think on the nylon, what did we use? On the nylon we used just what they call a sliver guide, a nylon sliver guide, but on the steel we used henium pigtails guide. The henium is a very high temperature ceramic, which as far as abrasion is concerned, it is about as strong as diamond.

Q. What was its position?

A. That guide, the henium guide was positioned very, very close to the nip of the end feed roll, I would say it was maybe an inch and a half.

From this evidence, we conclude that the limitation of "guiding . . . continuously to cushion" is not inherent in the Klein disclosure.

Lanoue's testimony is also enlightening on the other limitation in question. In this regard, he testified as follows:

> There were spring-loaded pressure knobs on each side of this and this is what gave you your front roll pressure, so to speak.
>
> These rolls, these stack rolls also had pressure, spring-loaded pressure, which you could adjust. (KR 1661)

* * *

A. The second, the number two set of rolls, is going at approximately one and a half to two times faster than the first set of rolls. This is creating a tension.

Q. Between the sets of rolls?

A. Yes, between the sets of rolls.

Now, remember, I have the nylon and the stainless incapsulated to these rolls and these rolls, as I mentioned before, have spring-weighted pressure, plus you have got these 180 degree wraps. That is so that no slippage of fibers will occur.

Now, as you can see in the second stack of rolls, we had essentially the same sort of thing, the same diagram, the yarn and the steel in the sandwich is making a 180 degree wrap around these rolls, that is the second stack of rolls, for the same reason, so that when you get to the final drafting rolls you will not have any slippage. You are actually drawing your fibers out instead of just slipping all the way through. (KR 1669-70)

* * *

The metal fibers started to randomly break.

Q. In what zone?

A. In the A Zone, while the nylon was serving as a cushion for it, because remember the Brunsmet, the metallic yarn, only had one percent of elongation and whenever it was subjected to drafting, it had a tendency to curl upon itself and create masses of tangled steel fibers, which you could never do anything with afterwards.

So the nylon served as a cushion or a control, while the steel was being broken randomly in this zone.

The steel was essentially letting itself break up at its weakest point, randomly in different lengths. (KR 1671)

The random breaking of the metal filaments described by Lanoue corresponds to the limitation in count 1 of "to break limited numbers of said filaments generally continuously. . . ." It is clear from Lanoue's testimony that the tension control recited in the count does not inherently flow from merely introducing the tow and sliver into the back rolls of a roller drafting machine, but requires adjustments of the pressure on the rollers in order to assure that the proper tension is applied to the metal filaments in order to achieve the desired breaking action.

Accordingly, we hold that Klein has no right to make claim 16 (count 1) or any of the claims corresponding to the other counts in issue since the remaining claims depend directly or indirectly from claim 16. Although this holding entitles Goodbar to the award of priority in this interference, for the sake of completeness we will consider the other issues mentioned at the beginning of this opinion.

II

Klein renewed his motion to strike the testimony of the following witnesses who testified on behalf of Goodbar—Goodbar, Pressley, Varin and Mewborne (Appendix to Klein's brief, page 9). Klein first moved to strike this testimony on the record during Goodbar's testimony period. Each of these witnesses refused to answer one or more questions, at the direction or request of counsel for Goodbar, propounded by Klein during cross-examination. Klein contends that the questions related to priority issues and witness credibility issues and, thus, were proper cross-examination questions. Goodbar argues, on the other hand, that they were outside the scope of the direct and were either related to a time period prior to late January 1970 when Goodbar allegedly conceived and reduced to practice the invention in issue or related to the disclosure in Goodbar's patent.

Goodbar contends, and we agree, that the questions directed to the period prior to Goodbar's alleged date of conception were intended to elicit testimony as to derivation of the invention by Goodbar from Klein. We believe Goodbar properly directed his witnesses not to answer those questions. The burden is on Klein to establish derivation, and he could have called these witnesses during his testimony in chief if he wanted to question them with respect to an issue on which he bears the burden of proof.

Goodbar argues that the witnesses were properly instructed not to answer questions regarding the disclosure in Goodbar's patent since they were outside the scope of the direct testimony and that the board can interpret the patent without anyone elses interpretation. We agree with Goodbar on this point also. *Paine* v. *Inoue,* 195 USPQ 598 (Bd Pat Intf. 1976). There is no issue in this interference as to Goodbar's right to make the counts. Thus, the refusal of the witnesses to answer questions directed to Goodbar's disclosure was not improper.

Klein's motion to strike the testimony of Goodbar, Pressley, Varin, and Mewborne is denied.

III

As the parties' applications were copending, the junior party Goodbar must establish his case for priority by a preponderance of the evidence. *Peeler* v. *Miller,* 535 F.2d 647, 190 USPQ 117 (CCPA 1976).

The evidence submitted by Goodbar consists of the depositions of the inventors Reid Goodbar and Arther Pressley of Roger Varin, James Stewart, George Mewborne and of Ernest Zimmermann, together with associated exhibits, taken during Goodbar's period for testimony in chief. In addition, Goodbar took the deposition of James A. Lindsey during Goodbar's period for rebuttal testimony.

Goodbar alleges conception and a reduction to practice on January 24, 1970 (Goodbar's main brief, pages 5-14). Prior to this time their efforts to blend steel tow and nomex fibers had been unsuccessful because the tow would not stay on the Nomex sliver but would slip off the sliver and be cut by the draw rolls. The cut pieces of tow formed slubs in the drawing and would result in unsightly black spots in the finished yarn.

On January 24, 1970 Goodbar and Pressley purportedly met at Riegel's Research and Development facilities in Ware

Shoals, South Carolina and devised sliver guides and guides for the steel tow so that the steel would be guided on the textile sliver at a location directly behind the back rolls of an Ideal draw frame. They also purportedly devised a means for placing tension on the spools holding the steel tow so that there would be tension on the steel tow from the spool to the back rolls of the draw frame. They then purportedly ran a half a can of Nomex sliver and directed the steel tow on top of the sliver into the draw frame and obtained a slub free drawing. Pressley described the invention in his notebook and that description was then signed by Pressley and Goodbar purportedly on January 30, 1970 (GX 26).

The activities by Goodbar and Pressley which purportedly occurred on January 24, 1970 and the written description (GX 26) have not been corroborated by evidence independent of the inventors. Thus, the testimony of Goodbar and Pressley as to their activities on January 24, 1970 and Pressley's written description are accorded no weight. *Reese* v. *Hurst* v. *Wiewiorowski, 661* F.2d 1222, 211, USPQ 936 (CCPA 1981).

Of the all of the witnesses called by Goodbar, Stewart was the only one who testified as to having actually observed Goodbar and Pressley process textile sliver and steel tow between January 24, 1970 and Klein's filing date. Nowhere in Stewart's testimony does he say he observed that the metal filaments were guided relative to the Nomex fibers to cause the latter continuously to cushion the metal filaments nor does he say that the tension on the draw rolls was adjusted to break limited numbers of said filaments generally continuously as called for in count 1. He testified that he helped Pressley make some guides for the fabric (sliver?) and the steel tow, but it does not appear that he had any concept of what the purpose of the guides was except to somehow reduce the slubs in the drawing. Stewart did not keep any record of his daily activities and, therefore, it is not clear how he could remember at his deposition seven years later when he observed the activities

which Goodbar and Pressley are relying upon for conception and a reduction to practice. He testified that he did not normally work with Goodbar and Pressley but just happened to be working with them on this occasion because of a slack period in his usual assignment of making plastic samples. He said that Pressley had shown him entries in his book from time to time including the period about which he was testifying, but he was not asked whether he had ever seen the portion of Pressley's book in evidence as GX 26. On cross-examination he said that he had made entries in Pressley's book, on redirect he said he did not make any entries in Pressley's book and on recross when asked if he thought his answers to both questions were the same, he said "Yes, sir." (GR 290). In our view, Stewart's testimony is inadequate to corroborate either conception or a reduction to practice on behalf of Goodbar and Pressley because it is not apparent from his testimony that he understood all of the steps in even the broadest count in issue during January 1970 when he allegedly witnessed the inventors blend steel filaments and Nomex fibers, and in addition we find his testimony to be incredible.

Even if we assume that Stewart's testimony were sufficient to corroborate a conception and a reduction to practice of the subject matter in counts 1 and 2, his testimony is manifestly insufficient to corroborate a reduction to practice of the subject matter in counts 4 through 7. He said nothing about surface friction characteristics as recited in count 4, a blend of steel and cotton as set forth in counts 5 and 6, and he did not observe the spinning step set forth in count 7 (GR 277-8).

Stewart testified that Pressley showed him a piece of fabric about 10 inches square in early February 1970 which purportedly included some yarn spun from the steel—Nomex blend that he had observed being processed through the drawing and roving steps in January. Stewart did not see either the spinning or weaving steps and, therefore, had to rely on what the inventor told him as to where the yarn for the fabric came from.

In our view, this testimony fails to establish that the fabric which Stewart saw incorporated yarn made from the materials which he allegedly saw processed through the drawing and roving steps in January since the testimony is not independent of the inventors. *Reese,* supra. Thus, even assuming Stewart's memory is accurate, unaided by any documentation seven years after the fact as to when he saw the fabric, his testimony is inadequate to corroborate Pressley's testimony regarding the origin of either the yarn or the fabric.

Varin, Goodbar's supervisor, received some yarn (GX 4) and two small pieces of fabric (GX 7 and 7-A) from Goodbar in late January. Varin had radiographs prepared of the yarn and the pieces of fabric (GX 5, 6 and 8).

Varin did not observe any step in the process of making either the yarn or the fabric, namely, drawing, roving, spinning, or weaving. Thus, his testimony is inadequate to corroborate Goodbar's testimony as to how the yarn and fabric were made. According to Varin the radiographs show that the steel was uniformly distributed and that there were no objectionable slubs (GR 39).

The fabric was not tested to (1) determine its antistatic properties or (2) washed to see if the steel would wash out of the fabric. Klein contends that both tests were required to establish that the yarn was suitable for its intended use. We note, however, that the counts do not specify any use. In our view, all that is required to establish a reduction to practice is a showing that a yarn capable of being used for any purpose was made following the steps set forth in the counts. We think that the utility of the yarn shown in GX 4 would have been apparent to those skilled in the art in January 1970. *Breen* v. *Miller,* 347 F.2d 623, 146 USPQ 127 (CCPA 1965). If Goodbar had established that the yarn of GX 4 was made by or on behalf of Goodbar by the process set forth in one or more of the counts of this interference, we would find that Goodbar had reduced to practice that count or those counts. However, based on the

record before us, we conclude that neither Varin nor Stewart has corroborated either conception or a reduction to practice of any count in issue by Goodbar prior to Klein's filing date.

On page 26 of the Goodbar reply brief, Goodbar contends, in effect, that the evidence is overwhelming that the process developed at Riegel's R and D was incorporated in Riegel's Alto, Georgia production plant prior to Klein's filing date. Goodbar contends that this was documented and testified to by Lindsey, Goodbar, Pressley, Cobb, Varin, Stewart and Mewborne. We note, however, that Cobb did not testify at all, Lindsey did not testify during Goodbar's case in chief, Varin said he could not recall seeing the drawing operation at Alto (GR 109) and Stewart said he was never at Alto (GR 267). Mewborne was concerned with marketing antistatic fabrics and there is no testimony in the recrod to indicate that he observed the Goodbar blending process at Alto prior to Klein's filing date. The testimony of Goodbar and Pressley regarding a reduction to practice at the Alto plant is entitled to no consideration for lack of adequate corroboration. *Reese,* supra.

Lindsey was the plant manager at the Alto plant during the time here pertinent. Although a number of letters which he wrote were introduced into evidence supposedly to show that the blending procedures at the Alto plant improved as a result of the Goodbar invention, he was only called as a rebuttal witness to determine if he could recall the shipment of an Ideal drawing frame from Alto to Ware Shoals in mid-January 1970. He had no present recollection of the shipment. In order to refresh his recollection, he was shown a number of documents including GX 13. The exhibit is a letter from Goodbar to Lindsey dated February 10, 1970 and the second paragraph states, "In R and D we have developed a much better controlling system for the steel and the sliver going through the drawing frame. We would like for you to try this method . . ." At GR 1009 Lindsey stated, "I didn't witness or see that development being made."

Accordingly, we conclude that Goodbar has failed to establish conception or a reduction to practice of any count in issue either at Ware Shoals or at Alto prior to Klein's filing date.

IV

Although Klein did not disclose the invention in his application in the manner required by 35 USC 112, we believe that the testimony of Lanoue is sufficient to establish that Klein conceived and reduced to practice the invention in counts 1, 2, 4 and 7 in October 1969. He testified that at Klein's direction he sandwiched steel filaments between two layers of nylon slivers, guided them into the back rolls of a drawing frame being careful to keep the steel sandwiched between the nylon so that the steel would be cushioned by the nylon. The pressure on the rolls was adjusted so that the nylon and steel did not slip and so the steel broke randomly at its weakest point. This random breaking corresponds to the limitation in count 1 of "to break limited numbers of said filaments generally continuously. . . . " Lanoue took the product of the drawing operation and ran it through a roving step to make a roving and then ran the roving through a spinning step to make a yarn. He showed the yarn to Klein and Klein said "My God, it looks great." (KR 1657-1678, GX 410). In order to provide a continuous operation, Lanoue used sliver guides for the nylon and a henium pigtail guide placed within an inch and a half of the back rolls to guide the steel between the nylon slivers (KR 1674-1975).

Inasmuch as we consider that the utility of the yarn would be apparent to those skilled in the art, we find that Lanoue reduced the invention to practice when he made the yarn and Klein expressed his satisfaction with it. However, the testimony of Lanoue and Beauford, inter alia, establishes that the yarn made by the process of counts 1, 2, 4 and 7 was used successfully for the purpose of reducing static electricity in tufted carpets by January 2, 1970 (KR 1698-1702; 1818-1822); KX 118).

Thus, we hold that Klein had conceived and reduced to practice the invention set forth in counts 1, 2, 4 and 7 prior to the earliest dates alleged by Goodbar and Pressley in their preliminary statement. Since the drawing made by Lanoue did not include cotton, Klein has not proven a reduction to practice prior to his filing date as to counts 5 and 6.

V

Goodbar filed a motion to strike the testimony of two of Klein's witnesses, namely, Charles F. Hedlund and Philip E. Johnson. We have not had to consider the testimony of those two witnesses in reaching our decision herein and, therefore, we dismiss the motion as being moot.

VI

Klein did not file a motion to dissolve under 37 CFR 1.231 on the ground that Goodbar et al. committed fraud on the Patent and Trademark Office in filing and prosecuting their patent application. Klein requests us to consider this issue at final hearing. The evidence which Klein relies upon for his fraud allegation was known to him prior to the declaration of this interference due to joint efforts on the part of Brunswick and Riegel to develop a suitable antistatic fabric for hospital uniforms. Thus, if Klein wanted to raise the ancillary issue of fraud, he could and should have raised it during the motion period. Since the question of fraud was not timely raised, we decline to consider it at this stage of the proceeding. *Magdo* v. *Kooi*, ____ F.2d ____, 216 USPQ 1033 (Fed. cir. 1983).

VII

Klein has also raised the question of derivation in his brief. However, based on the holdings that we have made on the questions already considered above, we deem it unnecessary to reach the question of derivation.

VIII

Priority of invention of the subject matter in counts 1, 2, and 4 through 7, all of the counts in issue, is awarded to Reid C. Goodbar and Arther Mitchell Pressley, the junior party.

/s/ NORMAN G. TORCHIN
Norman G. Torchin
Examiner of Interferences

/s/ LORRAINE A. WEINBERGER
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